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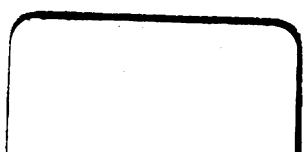
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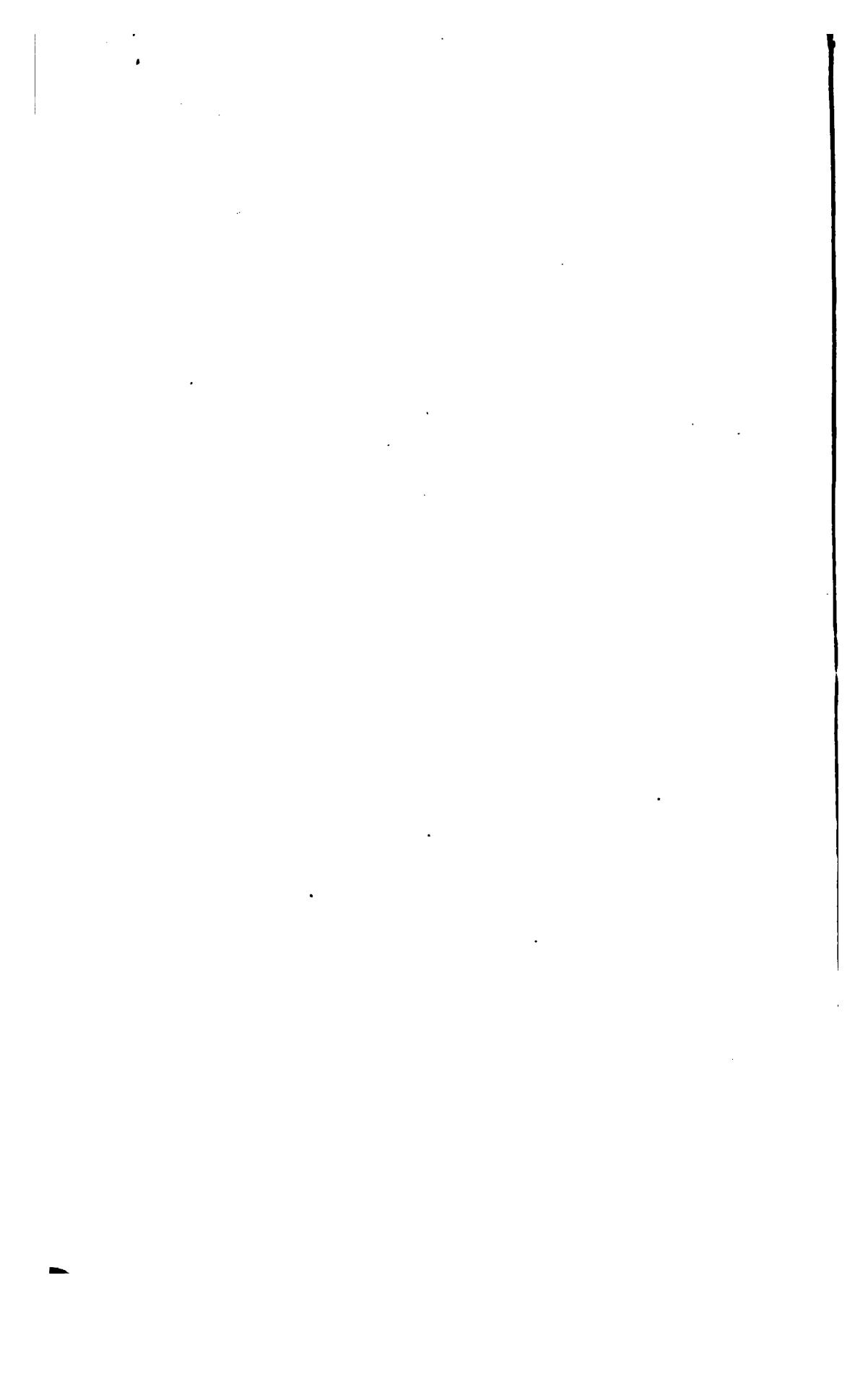
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**REPORTS OF
BANKRUPTCY
AND
COMPANY CASES**

DECIDED IN THE
High Court of Justice, the Court of Appeal,
the Privy Council, and the House of Lords.

EDITED BY
EDWARD MANSON,
Of the Middle Temple, Barrister-at-Law,

AND
AUBREY J. SPENCER,
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VOL. XIII.

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REPORTS OF
BANKRUPTCY
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IN RE BRINDLEY, EX PARTE BRINDLEY.

1905, December 15. C.A. VAUGHAN WILLIAMS, STIRLING AND COZENS-HARDY, L.J.J.

Bankruptcy—Petition—Deed of Assignment—Clause empowering Trustee to Pay any Dissenting Creditor in Full—Recognition of Deed by Petitioning Creditor—Estoppel—Bankruptcy Act, 1883, s. 7, sub-s. 3.

A creditor who by his acts recognises the title of the trustee under a deed of assignment executed by a debtor for the benefit of his creditors cannot afterwards rely on the execution of the deed as an act of bankruptcy, notwithstanding that the creditor has all along refused to assent to it.

A clause in a deed of this character empowering the trustee to pay in full any creditor who may decline to execute or assent to the deed is an improper clause.

APPEAL by the debtor from a decision of the Divisional Court (BIGHAM, J., and WALTON, J.) allowing an appeal against the refusal of the Registrar of the County Court of Staffordshire, holden at Hanley, to make a receiving order (1).

On 8 September, 1905, J. W. Brindley, a timber merchant, executed a deed of assignment of his property to C. E. Bullock, as trustee, for the benefit of his creditors generally; and the deed was

(1) 12 Manson, 387; 75 L. J. K. B. 46.

duly registered as a deed of arrangement. At the end of the deed was the following clause: "And it is hereby agreed and declared that if the trustee in his own discretion shall think it expedient to do so; or if a committee of inspection shall be appointed by the creditors, then if a majority of such committee shall so direct it shall be lawful for the trustee to pay in full, or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents."

At the date of this deed the appellants, Messrs. Taylor & Co., were creditors of the debtor to the extent of about 694*l.* for goods supplied. In answer to a circular convening a meeting of the creditors to be held on 15 September, Messrs. Taylor & Co., on 11 September, wrote to Messrs. Alcock & Co., the solicitors of the debtor and also of the trustee under the deed, refusing to consent to any arrangement except payment in full as to two items in their account, on the ground that as to them they had special grounds of complaint. At that date they were unaware of the above clause in the deed, but at a later date, after they had become aware of it, they attempted to obtain payment in full of these two items under the above clause in the deed.

A further fact, which was mainly relied on in the Court of Appeal, was that after the meeting of creditors the trustee carried on the debtor's business as a going concern, and gave orders for goods to several creditors. Amongst other orders on 26 September, he wrote to Messrs. Taylor & Co. a letter headed "*In re Brindley*," and signed by him "as trustee," giving an order for a specific quantity of timber "which is required in the realisation of the estate"; and on 28 September, Messrs. Taylor & Co. invoiced the timber accordingly to the trustee, describing him as such, and received his cheque in payment, which they cashed, and the proceeds of which they had retained.

On 25 September Messrs. Taylor & Co. presented a bankruptcy petition against the debtor, alleging the deed of assignment of 8 September as the act of bankruptcy.

On 6 October the petition was heard by the Registrar, when he refused to make a receiving order, on the ground that the correspondence between the debtor and the petitioning creditors showed that the petitioning creditors had used every exertion to obtain an

undue preference as to payment in full of part of their debt, and further that they had acquiesced in the deed of assignment by continuing to trade with the debtor's trustee.

On appeal the Divisional Court reversed his decision, and made a receiving order, from which order the debtor now appealed.

Herbert Reed, K.C., and B. C. Brough, for the appellant:

These creditors tried to get the benefit of the special clause contained in the deed of assignment and must be taken to have acquiesced in the deed. Moreover, by continuing to do business with the trustee they recognised his title under the deed, and the case is governed by the principles laid down in *In re Hawley, Ex parte Ridgway* [1897] (2); *In re Woodroff, Ex parte Woodroff* [1897] (3); *In re Stray, Ex parte Stray* [1867] (4); and *In re Rees, Ex parte Alsop* [1859] (5). The case is also within the rule that no person shall make use of the weapon of bankruptcy to obtain an advantage over other creditors: *In re Shaw, Ex parte Gill* [1901] (6); *In re Debtor, Ex parte Debtor* [1904] (7); and Bankruptcy Act, 1883, s. 7, sub-s. 3.

F. E. Smith and Rittner, for the respondents:

The decision of the Divisional Court was right on the facts. There was no such recognition of the deed of assignment as to preclude these creditors from relying on it as an act of bankruptcy, and they had a right to say that unless they were paid these particular debts in full they would not sign the deed. The language of CARRNS, L.J., in *In re Stray* (4), must not be pressed too far, and the cases of *In re Shaw* (6) and *In re Goldberg* (7) show that something more is wanted than is to be found in the facts of the present case to preclude the creditors from presenting this petition.

[Their Lordships enquired if it was common practice to insert a clause empowering the trustee to pay in full any debts—and not

(2) 4 Manson, 41; 76 L. T. 501.

(3) 4 Manson, 46.

(4) L. R. 2 Ch. 374; 36 L. J. Bk. 7.

(5) 1 De G. F. & J. 289; 29 L. J. Bk. 7.

(6) 83 L. T. 754; 49 W. R. 264.

(7) 91 L. T. 664; 53 W. R. 223. Affirmed on appeal, *sub nom. In re Goldberg*, 21 T. L. R. 139.

merely debts to which a preference is given by statute—in deeds of this character, and expressed a strong opinion against it.]

The clause in this deed goes further than is usual in such cases.

VAUGHAN WILLIAMS, L.J.: I will make a very short statement of the law which in my opinion is conclusive of this case. Here we have a deed of assignment by the debtor for the benefit of his creditors. That deed is by law an act of bankruptcy, and in the old days it was called a "fraudulent" assignment or conveyance, but in modern times that expression has not been reproduced in any Act of Parliament relating to bankruptcy. In looking at *In re Wood, Ex parte Luckes* [1872] (8), we find a very plain statement by Lord Justice MELLISH that the omission of the word "fraudulent" does not make the slightest difference. The truth of the matter is that it was not necessary to use the word "fraudulent," or any word of that sort, in the earlier Acts of Parliament, because an assignment of his property by an insolvent debtor must necessarily be a fraud on the creditors. Now, there being such a deed of assignment in the present case, the sole question is whether, as against Messrs. Taylor & Co., the petitioning creditors, the deed can be regarded as void and as a good foundation for the petition. With regard to the first point dealt with by Mr. Justice WALTON, I do not intend to say anything, for it is not necessary that I should say that there was any conscious intent on the part of Messrs. Taylor & Co. to obtain a preference over the other creditors; but I see no reason for dissenting from the conclusion at which Mr. Justice WALTON arrived. I have, however, to deal with another point—namely, whether there had been an estoppel as against the petitioning creditors based on acquiescence. It is said that there is an estoppel, and one based upon a proposition so plain that no one who recognised that this proposition had to be dealt with would dispute the result for one moment. If a man treats a deed as being an honest deed which cannot be impeached, and in treating it takes an advantage under it, it is impossible that he should be allowed afterwards to say that a person taking under that deed has no title. That is the principle upon which all the cases

(8) L. R. 7 Ch. 302; 41 L. J. Bk. 21; 26 L. T. 113.

proceed, beginning with *Ex parte Alsop* (5) and going down to *In re Stray* (4).

Now, in the present case, what was it that Messrs. Taylor & Co. did which amounted to a recognition that this deed conferred a good title upon the trustee so as to preclude them from saying that the deed was a fraud on creditors? In the first place, they accepted an order from the trustee under that deed for a supply of timber, and received payment by a cheque; in doing that they clearly recognised the title of the trustee. They had no right to accept that money if their intention was afterwards to dispute the trustee's title. Then their subsequent position was by no means improved when it is recollectcd that they were creditors who up to this time had said they would not assent to the deed unless they received an advantage over the other creditors. Their next act of acquiescence was this: Having become fully aware of the circumstances with regard to their position—that is to say, having become aware that there was an act of bankruptcy, and that this deed had been accepted on the part of the majority of the creditors—Messrs. Taylor's position was such that they could not receive payment of that part of the debt due to them from the debtor in respect of which they said they were not willing to assent to the deed of assignment, unless the deed was a good deed, because it is quite plain that, there having been an act of bankruptcy on 8 September, 1905, any payment they received after that date was a payment they ought not to have received, and especially where the act of bankruptcy happened to be the calling together of the creditors as the result of a notice that the debtor was unable to pay his debts. That this was an act of bankruptcy is clear from section 4, subsection 1 of the Bankruptcy Act, 1883, which is in these words: "A debtor commits an act of bankruptcy . . . (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." In this case, especially where an act of bankruptcy had been committed by the execution of the assignment, every creditor ought to have known, apart from the fact that there had been an antecedent act of bankruptcy, and particularly from the nature of the later act of bankruptcy, that he had no right to obtain any part of his debt from the debtor not only because the title of the trustee related

back to the earlier act, but also because the debtor, having given notice of suspension of payment, could not make an honest payment to one of those creditors whom he had called together. Now, what is it that has happened? There is one way in which it is possible that Messrs. Taylor can get the money they claim and keep it, and that is under the clause at the end of the deed which empowers the trustee or the committee of inspection to give a preference to and pay any creditor who does not assent to the deed. In my judgment, the very fact that the non-assenting creditors here made an attempt to secure this sum to themselves by means of that clause was itself an acquiescence which estopped them from saying afterwards that the deed was not binding. Accordingly we have two recognitions of the deed by Messrs. Taylor & Co.—one in accepting payment for the timber supplied by them to the trustee and the other in attempting to obtain under the last clause of the deed payment of a sum of money which they could obtain effectively only under the deed. Now I consider that in the circumstances it is not at all necessary for me to go through all the cases that have been cited to us, but there are two of them to which I may refer. One is *Ex parte Alsop* (5); and there I need only read the following passage from the judgment of Lord Justice TURNER: "The only remaining question is, whether the petitioning creditor has so far assented to this deed as to have lost the right of availing himself of it as an act of bankruptcy. Upon the result of the evidence, I have come to the conclusion that the petitioner must be considered as having so far assented to the deed as to have precluded himself, notwithstanding his refusal to sign it, from disputing it. I am wholly unable to account for his letter of the 8th November to the trustee, upon the assumption that at that time he was not an assenting party to the deed as a deed to be executed by the requisite number of creditors." The letter of 8 November was simply a letter in which the petitioning creditor asked that he might be supplied with the particulars of a sale which was about to take place of part of the property subject to the assignment, undoubtedly that he might have a chance of attending the sale about to be made by the trustee under the trusts of the deed. Then in *In re Stray* (4), one finds in the judgment of Lord Justice CAIRNS the following passage, which has been referred to several

times to-day: "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed." Then that is followed by a passage showing that Lord Justice CAIRNS did not for one moment intend to say that Goody must be taken to have assented to being bound by the deed, but only that he had by his conduct put himself in such a position that he could not be heard to say that the deed on which he proposed to base his bankruptcy petition was a fraudulent deed. And I have only to add this—that it is pure estoppel which prevents the would-be petitioning creditors here from resiling from the deed of assignment. It is not a case of what they said, but of what they did—whether they did not in fact recognise the title of the trustee under this deed. They have no right to say that the trustee had no title when at the very same moment they were recognising the title of the trustee. Even though they may in words have been disputing the title all along, they cannot get rid of the effect of their own acts. Under these circumstances the proper course is to allow this appeal, and to say that the receiving order ought not to have been made, because the petitioning creditors here by their acts have recognised the title of the trustee under this deed, and cannot afterwards be heard to say that this deed is a void deed.

STIRLING, L.J.: I am of the same opinion, and will state my reasons very shortly. On 8 September, 1905, the debtor executed a deed of assignment for the benefit of his creditors. On 26 September the trustee under that deed wrote to the petitioning creditors saying that he would be obliged if they would supply him with certain quantities of timber which were required in connection with the realisation of the debtor's estate, and on 28 September the petitioning creditors invoiced a certain amount of timber to the trustee of the creditors' deed, the invoice describing him as such, and the trustee sends his cheque to the petitioning creditors in

payment for the goods, which the petitioning creditors cash and put the proceeds in their own pockets. Now they present a petition in which they rely on the execution by the debtor of this deed of assignment as an act of bankruptcy, and claim to treat this deed as a void deed as against themselves, and to treat all transactions under this deed as void transactions as against themselves. The answer is : "It is impossible to do so: you have dealt with the trustee acting in the administration of the debtor's estate to which according to your view the trustee has no right at all, telling him all the time that he had not the slightest right to make any alteration in the debtor's estate." The reply attempted is : "We were all the time writing and saying that we did not consent." That, however, is no reply. The petitioning creditors have by their acts treated the deed as a good deed, and they cannot turn round and reprobate what they previously approbated by their acts. The case in my opinion falls entirely within the principle of *Ex parte Alsop* (5), and *In re Stray* (4). I do not know that we are really differing from what was decided in the Divisional Court, for, looking to the judgment of the Divisional Court, I do not think that this view of the case was one presented to that Court. I think the appeal ought to be allowed.

COZENS-HARDY, L.J.: I am of the same opinion, and for the same reasons. I only wish to say one thing. The last clause in this deed of assignment is as follows: [His Lordship read it.] In plain English this clause enables the trustee or committee of inspection to directly offer a bribe to any creditor to induce him to assent to the deed. In my opinion that is a most improper clause, and may go far to invalidate a deed, though otherwise free from objection.

Appeal allowed.

Solicitors: *M. A. Orgill*, agent for *Alcock & Co.*, Burslem, for the Appellant.

Norris, Allens & Chapman, agents for *J. M. Quiggin and Son*, Liverpool, for the Respondents.

IN RE A. W. MILLS & CO.

1905, December 15, 18. C.A. VAUGHAN WILLIAMS, STIRLING AND COZENS-HARDY, L.JJ.

Bankruptcy—Assignment of Debtor's Property—Assent of Petitioning Creditor—Further Act of Bankruptcy—Estoppe.

At a meeting of creditors it was resolved that a deed of assignment of all the debtors' property should be executed for the benefit of their creditors. B., one of the creditors present, did not assent or dissent; but when a nominee of the debtors was proposed as trustee of the deed he objected, and suggested another name, which was adopted by the meeting. B. served on the debtors a bankruptcy notice founded on a judgment debt, which the debtors failed to comply with:

Held, that, though B. might by his conduct be prevented from availing himself of the deed of assignment as an act of bankruptcy, yet he was not so bound by the deed as to be precluded from petitioning and obtaining a receiving order for non-compliance with the bankruptcy notice.

Observations of Lord CAIRNS, L.J., in *In re Stray, Ex parte Stray* [1867] (1) followed.

APPEAL from decision of Mr. Registrar Giffard, who made a receiving order against the debtors.

The petitioning creditor, Mr. Baines, had, on 28 July, 1905, served on the debtors a bankruptcy notice founded on a judgment in the King's Bench Division, which the debtors failed to comply with, and in consequence of the failure the receiving order was made.

On 21 July, 1905, a meeting of creditors of the debtor had been held, which was adjourned to 28 July, 1905. The petitioning creditor was present at these meetings. A resolution was put to the meeting on 28 July, 1905, that the debtors should execute a deed of assignment of all their property for the benefit of their creditors. The petitioning creditor declined to state whether he would assent to this or not. On the resolution being put, eight creditors voted for it, and none against. The petitioning creditor did not vote.

A nominee of the debtors was then proposed as a trustee of the deed. The petitioning creditor shouted out that he did not, under the circumstances, consider it proper that a nominee of the debtors should be appointed a trustee, and he mentioned the name of one

(1) L. R. 2 Ch. 374; 36 L. J. Bk. 7.

Berry as a more fit and proper person than the debtors' nominee. He deposed that he did so as a matter of opinion and advice on his part to the creditors. The creditors accepted Berry as trustee.

The debtors contended that the petitioning creditor was estopped from petitioning by his conduct at the meeting of 28 July, 1905.

The debtors appealed from the receiving order.

Ernest M. Pollock, K.C., and Hansell, for the appellants :

The petitioning creditor by his conduct at the meeting of creditors was prevented from doing any act inconsistent with his assent to the deed of assignment. He cannot, therefore, petition even on another act of bankruptcy : *In re Rees, Ex parte Alsop* [1859] (2) ; *In re Stray, Ex parte Stray* (1) ; and *In re Mendelssohn, Ex parte Mendelssohn* [1902] (3). In the latter case VAUGHAN WILLIAMS, L.J., speaks of a creditor who has assented to a deed being prevented from afterwards doing any act inconsistent with his own assent. Until bankruptcy this is a perfectly good deed. The creditor has assented to it by his conduct, and could not use it as an act of bankruptcy on which to petition, nor can he use any other act as ground for a petition. The deed would have been a perfectly good defence to an action. Why should it not be an equally good defence to a petition in bankruptcy ? The petitioner must necessarily assume that this deed is fraudulent, and this the creditor cannot properly say. The passage in the judgment of VAUGHAN WILLIAMS, L.J., in *In re Mendelssohn* (3), really covers this point.

McCall, K.C., and Cooper Willis, for the respondent, were not called upon.

VAUGHAN WILLIAMS, L.J. : I propose to deal with this case upon the basis that the petitioning creditor did something more than shout out that a nominee of the debtor was not a proper person to be trustee, and went on to offer his advice that Mr. Berry was a proper person to appoint, and that advice was acted on.

It may be that the effect of that was to make the petitioning

(2) 1 De G. F. & J. 289; 29 L. J. Bk. 7.

(3) 10 Manson, 9; [1903] 1 K. B. 216, 222; 72 L. J. K. B. 106, 109; 87 L. T. 721.

creditor in a sense privy to the execution of the deed of assignment so that he could not afterwards use the execution of the deed as an act of bankruptcy upon which to found a bankruptcy petition. But one thing is quite plain, that Mr. Baines did not so act that he was bound by the deed in any way; and if he was not bound by that deed there was nothing to prevent him recovering any debt that was due to him in any way that he could, and nothing to prevent him presenting a petition based upon some other act of bankruptcy.

I expressed an opinion to that effect in the case of *In re Woodroff, Ex parte Woodroff* [1897] (4), speaking of the other act of bankruptcy as another independent act of bankruptcy. It was not necessary for the decision of that case, but I think that that observation was right, and I am prepared to act upon it; and I think so the more because, when one looks at the judgment of Lord CAIRNS in *In re Stray* (1), one finds this passage: "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed. I again repeat that I think nothing passed actually to bind Mr. Goody entirely to abide by the deed and to come in under the deed as a person who would take no other proceedings for the recovery of his debt, but what I think Mr. Goody is estopped from saying is, that this deed, at the moment it was executed under the circumstances I have mentioned, was a fraudulent deed, and one of which he can complain for the purpose of alleging an act of bankruptcy committed by the debtor."

In my judgment the conclusion upon which my observation was based in *In re Woodroff* (4), is entirely supported by that passage from the judgment of Lord CAIRNS which I have just read.

STIRLING, L.J.: I am of the same opinion. I think that by his conduct in this case the petitioning creditor put himself in a

position which prevented him from alleging that the assignment in favour of the creditors was an act of bankruptcy. But it is quite clear from what is expressly stated by Lord CAIRNS in *In re Stray* (1), that a person may be in such a position as to be precluded from alleging that without being bound by the deed.

In this case it is perfectly clear from the evidence that the petitioning creditor refused to be bound by the deed. He is not for the purpose of the petition in this case obliged to allege the execution of this deed as an act of bankruptcy upon which he relies. He relies upon another act of bankruptcy. It may be that if an order is made on this petition the trustee would be entitled to say that the bankruptcy relates back to this deed, because the trustee will not be bound; but as regards the petitioning creditor himself he is not alleging as an act of bankruptcy that it was a fraudulent deed.

I think, therefore, that the appeal fails.

COZENS-HARDY, L.J.: I agree.

Appeal dismissed.

Solicitors : *Culross & Holt*, for the Appellants.

Goldberg, Barrett & Newall, for the Respondent.

BRITISH EQUITABLE ASSURANCE CO. v.
BAILY (1).

1905, November 28; December 15. H. L.

Company—Life Assurance—Deed of Settlement—By-laws—Power to alter by-laws—Prospectus—Participating Policy-holder.

Where a policy of life assurance is expressed to be issued subject to the deed of settlement of the company and its by-laws, and by the constitution of the company, power is given in a prescribed manner to alter the by-laws from time to time, and no reference is made in the policy to prospectuses issued by the company, the policy constitutes the whole contract, and the Court cannot for the purpose of construing the contract refer to such prospectuses.

Decision of the Court of Appeal (2) reversed.

APPEAL from an order of the Court of Appeal (VAUGHAN WILLIAMS, L.J., STIRLING, L.J., and COZENS-HARDY, L.J.) dated 10 February, 1904, affirming a judgment of 29 July, 1903, of KEEKIEWICH, J., in an action brought by the respondent (on behalf of himself and of all other participating policy-holders in the appellant company), as plaintiff, against the appellant company, as defendant, which company was, at the date of the writ in this action, a company registered with unlimited liability under section 209 of the Companies Act, 1862, but which had lately been re-registered under the Companies Acts, 1862 to 1900, with limited liability. It was agreed between the parties that the question upon which the decision of the House was required was, whether, having regard to the contractual relations between the company and the participating policy-holders, the company was at liberty to alter the provisions of by-law No. 4 of 1854, in such manner as to vary the rights of those policy-holders under that by-law. The appellants contended that the company was at liberty to do so under the contracts between them and the respondent.

The company was constituted under a deed of settlement, dated 15 July, 1854. By clause 24 of that deed power was given to the company at extraordinary general meetings to make by-laws, and by clause 56 any of the provisions of the deed of settlement and

(1) *Coram*, Lord Macnaghten, Lord Robertson, and Lord Lindley.

(2) 11 Manson, 169; [1904] 1 Ch. 374; 73 L. J. Ch. 240; 90 L. T. 335; 52 W. R. 549; 20 T. L. R. 242.

any by-law of the company might be altered, repealed, or suspended by a by-law or by-laws, but not otherwise. At an extraordinary general meeting of the company, held on 6 December, 1854, certain by-laws were made, among which were the following: "(2) That in the beginning of January and July in each year, a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of 7*l.* per centum per annum up to the next preceding 31 December and 30 June respectively, and such interest shall, at some time in the months of January and July, to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company only at the company's chief offices for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear," and "(3) That in the month of January in the year 1858, and in every subsequent third year, a general valuation and calculation shall be made of the whole assets and liabilities of the company, and after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors," and "(4) That in the month of January in the respective years last aforesaid, a calculation shall be made by the actuary of the profits that have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid, and of the other expenses of the company shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the said last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided amongst the shareholders according to the amount of shares held by each and be paid to them along with the next half-yearly dividend."

In April and May, 1903, it was proposed, under the provisions of section 1 of the Companies (Memorandum of Association) Act, 1890,

to alter the constitution of the company by registering it with limited liability and substituting a memorandum and articles of association for the deed of settlement, and a petition was prepared for the confirmation of the proposed alteration by the Court, and at the same time it was proposed to carry into effect a scheme to enable the reduced rate of 3½ per cent. to be used in the calculations at the quinquennial valuations. For this purpose a very large sum, which represented accumulated profits belonging to the shareholders, was proposed to be carried to the credit of the life assurance fund. The proposed articles of association contained (*inter alia*) the following clauses: "103. Unless and until otherwise determined by the company in general meeting, there shall, on every valuation of the assets and liabilities of the life assurance branch of the company's business, be carried to the credit of a capital call account a sum equal to 5 per cent. of the divisible profits of such life assurance branch until the sums so carried to the credit of such account shall amount to £7,500^{l.}, and there shall on every valuation of the assets and liabilities of the other branches of the company's business, be carried to the credit of the members' profits account one-half of the divisible profits of such other branches. Subject as aforesaid and to the provisions of Article No. 104, and unless and until otherwise determined by the company in general meeting, the divisible profits of the whole of the company's business shall be carried to the credit of the life assurance branch, and to such fund thereof as the directors shall determine," and "104. Unless and until otherwise determined by the company in general meeting, there shall be paid to the members out of the profits of the company a fixed annual dividend of 2s. 6d. per share, and on the valuation in the year 1904, and in every subsequent fifth year, there shall be carried to the credit of the members' profits account a bonus equal to 5 per cent. of the divisible profits of the life assurance branch of the business in the quinquennium ending in such year." The articles of association containing the above recited articles were adopted by special resolution of the company, duly passed and confirmed at extraordinary general meetings of the company held on 3 April, 1903, and 1 May, 1903.

The respondent claimed (1) An injunction to restrain the company from paying, applying, or disposing of any part of the profits derived,

or to be derived, by the company from its business in connection with participating policies to or for the benefit of any person, or for any purpose other than to or for the benefit of the holders of participating policies ; and (2) a declaration that the company were not entitled to pay, apply, or dispose of such profits in any manner save to or for the benefit of the said holders of participating policies. His contention was that the scheme was in contravention of the terms upon which he and others effected policies in the company and would result in a large diminution of the fund available for bonuses.

The respondent stated that he had taken out policies in the company on the faith of prospectuses issued from 1862 until after the date of his policies, in which, after a reference to the disadvantages attaching to ordinary mutual societies, it was stated : "In the British Equitable Assurance Company these defects are avoided : (1) Complete security is given to every policy-holder absolutely without responsibility ; (2) The current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department, and the general premiums and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund. The policy-holders are thus placed in as good a position the moment they enter the company as if they had been ten years in most other societies. The profits are divided every three years."

The policies, however, contained no reference to the prospectuses, and were expressed to be subject to the deed of settlement and the by-laws for the time being.

Levett, K.C., and Whinney, for the appellants.

Lawrence, K.C., and Gates, for the respondent.

The House took time for consideration.

Lord MACNAUGHTEN : This case raises a question between an insurance company and the holders of participating life policies in the company's office.

At the suit of a plaintiff suing in a representative character Mr.

Justice KEKEWICH declared that the company ought to continue to distribute the entire profits arising from the participating branch of its business after making certain deductions (which it is not necessary to specify) among the holders of participating policies. The Court of Appeal has affirmed that order. The judgment of the Court was delivered by Lord Justice COZENS-HARDY. The ground of the decision is expressed in a single sentence : "A company cannot by altering its articles justify a breach of contract." No one I should think would be inclined to dispute the proposition. But with all deference that is not the question. The simple question is, what was the contract between the parties ?

The distribution of the profits in this company is governed by a by-law duly passed in accordance with the provisions of its deed of settlement made in 1854, when the company was completely registered under the Act then in force. The deed of settlement contains a clear and distinct provision empowering an extraordinary general meeting to make by-laws for the government of the company, subject to a proviso that such by-laws shall not be valid until confirmed by a subsequent extraordinary meeting. It was under this article that the by-law relating to the allocation of profits in favour of participating policyholders was made. There is a subsequent article declaring that "the provisions of the deed of settlement and any by-law of the company may be altered, repealed or suspended by a by-law or by-laws but not otherwise."

The plaintiff's proposal for insurance was made on a printed form in which the proposer expressly agreed to "confirm to and abide by the deed of settlement, and by-laws, rules and regulations of the company in all respects." The proposal was accepted. A policy which refers to the proposals was executed. It provides for the payment of the sum assured, and "all such other sums (if any), as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The conditions indorsed on the policy provide that the corporate funds, property and effects of the company as mentioned in the policy, after satisfying all prior claims and charges, "according to the provisions of the deed of settlement and the by-laws of the company for the time being"

shall alone be liable for the payment of the moneys payable under the policy.

If there were nothing more it would be absurd to suggest a doubt as to the right of the company to alter its by-laws in accordance with the provisions of the deed of settlement, however long the practice of the company as to the application of profits might have continued undisturbed. It appears, however, that this company, like all other insurance companies, has been in the habit of publishing a series of tables applicable to participating policies and other policies issued by the office. As is usual those tables are prefaced by an attractive prospectus, enlarging on the peculiar and extraordinary advantages offered to those who are willing to insure in the office. Now the prospectus under the head of "Mutual Life Assurance Department" points out the objections to ordinary Mutual Societies—objections as it seems to me, mainly if not entirely applicable to such societies at starting. It then states that in the British Equitable Assurance Company (which is not a mutual office any more than any other proprietary office which grants participating policies) these defects are avoided. Then follows the statement: "The current expenses of working the company are assessed rateably on the premiums received in the Mutual Life Assurance Department"—that is, the participating department—"and the general premiums and the entire profits made by the company in the mutual department after deducting the expenses are divided among the policyholders."

It was stated on behalf of the plaintiff, and admitted by the company, that the plaintiff insured in the company in reliance upon the statement contained in the prospectus, and was induced thereby to apply to the company for the grant of the policy in question, and "accepted such policy on the faith thereof and would not have done so in the absence of such statement." It is not clear to my mind what is meant by this allegation and admission. Probably it means no more than this, that the plaintiff was attracted to this particular office by its prospectus. Now the statement in the prospectus was an accurate statement of the position of affairs at the time when the prospectus was brought to the notice of the plaintiff. It will be observed that the prospectus does not purport to give an assurance of any sort that the

allocation of profits would never be altered, or to indicate that the system then in use and the practice existing at the time were essential features or fundamental conditions of the constitution of the company. Nobody, I should imagine, would effect an insurance in the belief that the laws and regulations of the office which he selects are immutable. What an insurer relies upon is the character and reputation of the company, and the certainty that no office which hopes to keep its business would think of altering the distribution of its profits to the prejudice of its policy-holders. Such a step would ruin the most flourishing company. It would be suicide.

I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract, or are to be treated as incorporated in the contract of insurance, and so limiting the powers of the company in the full and free exercise of which the plaintiff bound himself to acquiesce.

I have not troubled to refer to changes in the constitution of the company consequent upon the Act of 1862, or to the proposal now on foot to substitute a Memorandum and Articles of Association for the company's deed of settlement and its by-laws. The question would, I think, be precisely the same if the proposal were to alter the by-laws of the company under the provisions of the deed of settlement.

I move that the appeal should be allowed, and the action dismissed.

Lord ROBERTSON: The appellants are an assurance company, carrying on the business of assurance in its various departments. Among other branches of their business they issue life policies, the holders of which participate in the profits of the business. The respondent holds one of the policies. He is not a member of the company, and holds no relation to it other than that of a policy-holder. At the time when the respondent's policy was issued, viz., in 1886, the whole of the profits made in this branch, which is called the Mutual and Participating Branch, were divided among the policyholders in that branch. In 1908 a change was made by altering one by-law under the power given by another by-law;

and now there is first taken out of the profits provision for a reserve fund, and what is distributed among the policyholders is the balance, instead of, as formerly, the whole of these profits.

That this change was made in the interest of the company as an institution, and was matter of sound finance, is not in dispute. That it was competent to the company in terms of its constitution and regularly done is also not in dispute; and it is therefore unnecessary to deduce the various provisions in the deed of settlement and by-laws. The case of the respondent is that, standing as he does outside the company, his contractual rights as a policyholder have been violated by the change. The order which he has sought and obtained is a declaration that the appellants ought to continue to distribute the entire profits arising from the Mutual and Participating Branch.

Now the whole question in the case is: Did the appellant company contract with the respondent to the effect of depriving themselves of the rights which they had under their constitution to make this change? It seems to me not merely that they did not, but that, as part of the contract, the respondent bound himself to only such profits as should be declared according to the rules of the company as they existed at each declaration of profits.

The policy itself, to which one naturally first looks for the contract, gives no countenance to the respondent's claim, and on the contrary limits his rights to the amount assured and "all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time being." When we turn to the proposal we find that the respondent signed a declaration that: "I agree to conform to and abide by the deed of settlement and by-laws, rules and regulations of the company in all respects." The only express reference to profits contained in the proposal is in the eleventh question: "If in the Mutual Department, are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" (The answer was: "By way of addition.") The third question is: "Sum to be assured and for what term?" and the answer is: "400*l.*, payable under Table A." Now Table A. is all figures except the following words at the top: "Annual premiums

to assure a sum of money at death, with profits in addition," and at the bottom "the entire profits divided triennially." I have now stated everything bearing on the subject that is to be found in the policy, the proposal, and the only document referred to in these instruments, viz., Table A. These seem to me to constitute the contract, and they negative the respondent's case and establish that of the appellant. But the Court of Appeal and the learned Judge, whose judgment they affirm, have felt themselves entitled to decide the case not on those documents, but on the prospectus which was shown to the respondent before he made his proposal. The theory of Mr. Justice KEKEWICH was that there was a "collateral contract," while the learned Lords Justices justify the introduction of the prospectus on the somewhat singular ground that, inasmuch as Table A, which is referred to in the proposal, is to be found in the prospectus, therefore you are entitled to read the rest of the prospectus relating to mutual policies as part of the contract. I am unable to agree in this. We are not here in an action of damages, or of rescission of the contract, and I do not feel entitled when the respondent in his proposal refers to Table A, to hold him as incorporating all the rest, or part of the rest of the print in which that table is to be found. The passages in the prospectus on which the Court of Appeal proceed, contain a description of the system as *de facto* existing at the time. But it seems to me that the respondent, so far from binding the appellant company to perpetuate that system, has placed himself in the hands of the company to the extent of binding himself to "abide by" (those are the words of the proposal) their rules. There is nothing repugnant or unreasonable in his thus following the fortunes of the company, and this is what he has done.

For these reasons I think that the judgments appealed against ought to be reversed.

Lord LINDLEY: This appeal turns entirely on the contracts entered into between the assurance company and its participating policyholders represented by Mr. Baily. The contracts are contained in the policies issued to them. It is contended that the applications for these policies were based on the faith of prospectuses containing statements and holding out inducements which preclude the company from making alterations in the mode of

applying their profits without the consent of the policyholders. If these gentlemen were seeking to rescind or rectify their contracts on the ground of fraud or mistake, or were suing for damages occasioned by fraudulent misrepresentations, it would be legitimate to refer to the statements in the prospectuses on the faith of which they became policyholders. But the complaining policyholders are not doing anything of this sort, and the prospectuses not being referred to in the policies cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policyholders have been induced to enter. These contracts are to be found in the policies themselves. By each policy the company agree to pay to the executors of the assured a fixed sum out of the funds of the company, "and all such other sums, if any, as this company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being. Provided always, that this policy is made subject to the conditions and regulations hereon indorsed." That is the contract between the parties, but the indorsed conditions and regulations are part of it and the fifth is important. The company was formed as long ago as 1854, and the object of the fifth regulation is to limit the liability of the members of the company. But the regulation throws light on the position of the policyholders and on what they can claim under their policies. The fifth indorsed condition or regulation in effect provides that the funds of the company, "after satisfying prior claims and charges according to the provisions of the deed of settlement and by-laws of the company for the time being, shall alone be liable for the payment of the moneys payable under the policy, and that no shareholder, member, director, or other officer of the company shall be liable to any demand in respect of the policy beyond or otherwise than out of the payment in the manner and at the times provided for by the deed of settlement and the then by-laws of the company of the amount thus remaining unpaid of the shares held by him." The reference to the deed of settlement and by-laws for the time being is all important; for the by-laws determine how the profits of the company are to be disposed of, and those by-laws are subject to alteration from time to time by an extraordinary meeting of the shareholders of the company (see clauses 9, 24, 56, of the deed of settlement). The policy-holders

are not shareholders and have no voice in making or altering by-laws; but the sum payable under any policy in addition to the fixed sum mentioned in it is made by the policy itself to depend upon what the directors may have ordered to be added to such sum, and that depends upon their practice for the time being. The practice of the directors in its turn depends on how the profits are to be ascertained and divided in accordance with the by-laws which may be altered from time to time as above pointed out.

I am quite unable to adopt the view taken by the Courts below as to the inability of the company to alter their by-laws as they have done, and (*inter alia*) to make a sinking fund without the consent of the policyholders. I can find no contract to that effect. A collateral contract so wholly opposed to the contracts contained in the policies is not in my opinion established by the evidence in the case.

Of course, the powers of altering by-laws, like other powers, must be exercised *bona fide*, and having regard to the purposes for which they are created and to the rights of persons affected by them. A by-law to the effect that no creditor or policyholder should be paid what was due to him would in my opinion be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated and sought to be restrained is fair, honest, and business like; and will in the opinion of the directors and shareholders of the company be beneficial as well to the policyholders as to the shareholders. The sole question is whether such an alteration infringes the rights of the policyholders. In my opinion it clearly does not.

I am of opinion that the appeal should be allowed, and that the action should be dismissed.

Solicitors : *H. Gover and Son*, for all parties.

**CALTHORPE AND ANOTHER v. TRECHMANN AND
ANOTHER: MACLEAY v. TAIT (1).**

1905, November 14, 16, 17; December 15. H. L.

Company — Prospectus — Non-disclosure of Contract — Directors' Liability — Damages—Waiver Clause—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38.

In an action based on section 38 of the Companies Act, 1867, against a director, promoter or officer of a company for non-disclosure of a contract in a prospectus the plaintiff must prove that if he had known of the contract he would not have taken shares; that he has suffered damage from such non-disclosure, and that the defendant knew of the existence of the undisclosed contract.

The defendant may also be protected by a waiver clause which is honest and above suspicion.

Decision of the Court of Appeal (2) reversed.

APPEALS from decisions of the Court of Appeal (VAUGHAN WILLIAMS, L.J., ROMER, L.J., and COZENS-HARDY, L.J.), dated 26 July, 1904. Both cases were dependent upon the construction and application of section 38 of the Companies Act, 1867, which is now replaced by other provisions in the Companies Act, 1900. That section deals with the non-disclosure of material contracts on the formation of a company, and its effect is stated in Lord LINDLEY's judgment. The first appeal was from a judgment of Mr. Justice JOYCE's, dated 30 March, 1904, and the second from a decision of Mr. Justice KEKEWICH's, dated 22 April, 1904. The appellants in each appeal were directors of the Standard Exploration Company, and the claim against them was based on the non-disclosure of a contract dated 27 October, 1898, and made between the London and Globe Corporation and the Standard Company for the transfer to the latter of 5,000 deferred shares in a concern called the Austin Friars Finance Syndicate (Limited). The respondents alleged that they had taken shares in the Standard Company on the faith of a prospectus from which this contract which was material had been wilfully omitted by the appellants; that they had suffered damage, and that the contract was, therefore, in the words of the section to

(1) *Coram*, The Earl of Halsbury, Lord Robertson and Lord Lindley.

(2) 11 Manson, 444; [1904] 2 Ch. 631; 74 L. J. Ch. 43; 91 L. T. 474; 20 T. L. R. 710.

be "deemed fraudulent and void." The facts are stated in the report in the Court below, and also in the judgment of Lord LINDLEY.

Haldane, K.C., and *Gore Browne, K.C.* (*Cosens-Hardy* with them) for the appellants in the first appeal: *Grainger, K.C.*, and *Ashton Cross* for the appellants in the second appeal:

The plaintiff cannot recover unless he proves damage of which in these cases there is no evidence. The contract of 27 October, 1898, would not have deterred any intending contributor—it would rather have induced persons to subscribe. These cases are really governed by *Nush v. Calthorpe* [1905] (3), and are widely different from *Sullivan v. Mitcalfe* [1880] (4), and *Cackett v. Keswick* [1902] (5), where the omitted or suppressed contracts might well have deterred persons from taking shares. The appellants were not personally responsible for the prospectus, and the appellants accepted a waiver clause which was perfectly honest and indicated the contract.

Hughes, K.C., and *W. Higgins* for the respondents in both appeals:

Section 38 is framed in wide and stringent terms. It does not discriminate between different classes of contract and makes proof of actual damage necessary. Any undisclosed contract between the company and promoters is to be "deemed fraudulent." The clause was strictly enforced in *Twycross v. Grant* [1877] (6), *Cackett v. Keswick* (5), and *Baty v. Keswick* [1901] (7). The prospectus also was issued "knowing'y" to the appellants, who therefore cannot escape liability.

Haldane, in reply, cited *Greenwood v. Leather Shod Wheel Co.* [1899] (8).

The House took time for consideration.

- (3) 12 Manson, 260; [1905] 2 Ch. 237; 74 L. J. Ch. 493; 95 L. T. 585; 21 T. L. R. 587.
(4) 5 C. P. D. 455; 49 L. J. C. P. 815; 44 L. T. 8; 29 W. R. 181.
(5) 9 Manson, 388; [1902] 2 Ch. 456; 71 L. J. Ch. 641; 87 L. T. 11; 51 W. R. 69.
(6) 2 C. P. D. 469; 46 L. J. C. P. 636; 36 L. T. 812; 25 W. R. 701.
(7) 85 L. T. 18; 50 W. R. 14.
(8) 7 Manson, 210; [1900] 1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595.

December 15.

The EARL OF HALSBURY: Both these actions are actions for damages brought by the respective plaintiffs, who complain that they have been injured by the fraud of the defendants, and claiming damages for the loss they have sustained by the fraud of which they complain. As the actions are identical in their merit, I will in what I have to say hereafter treat the matter as if there were one plaintiff and one defendant. But for the 38th section of the Companies Act, 1867, it is certain that neither of these actions could have been brought; and the real question to be debated is whether that section does, or, rather, did, more than enact that, where a contract which ought to have been inserted in a prospectus is omitted, such omission shall be held to be fraudulent. That is what the section in terms enacts, and I think it decides no more.

Now, in order to entitle the plaintiff to recover damages where he sues for damage suffered, he must prove that he sustained them, and as one step towards that proof he must show that he acted on the faith of the fraudulent statement. It is an old judicial observation that fraud without damage or damage without fraud will found no action. Now, in this class of case, where mis-statements are made in a prospectus and people have been led to take shares the taking of which has led to loss, I have often said that it is quite a fair inference to draw—if the prospectus is calculated to induce people to take shares and they do take shares—that the prospectus, tainted with falsehood as it is, must be acted on as a whole—that people cannot be expected to analyse their own mental sensations so minutely, that they would be able to explain what particular statement had induced them to become subscribers; but the question under this section is a very different one, and I think to enable a plaintiff to recover damages he must convince the tribunal before whom the question comes that if he had known of the omitted contract he would not have become a shareholder. That is what he must prove. Now in this case I do not believe for a moment, for the reasons to be given by Lord LINDLEY, that there would have been the smallest difference in the plaintiff's conduct if the contract in question had been disclosed as it ought to have been. I have had the opportunity of reading what Lord LINDLEY has written on that subject, and I entirely concur with him. I also agree with him

as to the waiver clause. Where a clause of that sort has been inserted as part of the machinery for fraud it will, of course, afford no protection to its contrivers, but where, as in this case, it is a perfectly honest slip, why should it not be a protection? I know no reason. I move therefore that both appeals be allowed, and that both actions be dismissed, with costs, both here and below.

Lord ROBERTSON: It is in my opinion quite clear that the statute, by declaring a prospectus to be fraudulent, does not dispense the person founding on the fraud from proving that damage has resulted from the fraud. This is plain on principle; and, if that were needed, there is good authority for it.

On the other hand, the vice of the prospectus being an omission, the question whether, if that omission had not taken place, the result would not have been the same—that is to say, the shares would have been taken—is one requiring cautious and delicate handling. I do not think it an insoluble question, as has been suggested. But even for the person whose election to take or not to take is in debate, and even supposing him to speak with absolute candour, it requires a mind of singular clearness to decide how he would have acted if the omitted contract had been named; and it has to be borne in mind that it is not how he ought in reason to have decided, but how he (the particular individual) would have decided, that has got to be ascertained. Accordingly, one has to make full allowance for all sorts of considerations and prejudices—that the contract made one too many and the thing too complicated—or that he did not like the names of the people, and so on. Now, applying this view to the present case, I cannot join in any emphatic assertions about the conclusiveness of the evidence. But I take into account the nature of the omitted contract and the account given by this gentleman of his views of the enterprise, and I think it safe to infer that the omission of this contract did not affect his decision to apply for shares, and that he would not have acted otherwise if it had been mentioned.

On this ground I agree in the reversal proposed.

Lord LINDLEY: Both of these appeals turn on the true construction of section 38 of the Companies Act, 1867, and of the

application of that section to the facts of the cases which have to be considered.

Before attempting to apply the section to those facts it will be convenient to examine the section itself and the construction which has been judicially put upon it. The section consists of two parts. The first states that a company's prospectus must contain certain particulars, the second declares that a prospectus which does not contain those particulars "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contracts." The particulars which are required to be stated are "the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus." The section says no more.

When the section has to be applied to any particular case—*i.e.*, when a plaintiff sues a defendant for damages for a breach of duty imposed by this section—the following questions necessarily arise, *viz.* :—(1) Is the document to which the plaintiff says no reference is made in the prospectus such a contract as is described in the first part of the section? If it is not such a contract, there is an end of the case. If it is, and if it is not disclosed, then it is necessary to inquire (2) whether the defendant was a promoter, director, or officer of the company; (3) whether he knowingly issued the prospectus; (4) whether the plaintiff took shares on the faith of the prospectus; (5) whether he had notice of the undisclosed contract before he applied for his shares?

Assuming that all these questions are answered in the plaintiff's favour, there are still other questions, as to which the section is wholly silent—*viz.*, what is the plaintiff's remedy, and what more must he prove to entitle himself to damages? These matters are left to be dealt with by the judicial tribunals of the country, and they have nothing to guide them except the established principles applicable to actions for fraudulent misrepresentations. *Twycross v. Grant* (6) decided that section 38 of the Companies Act, 1867, included all contracts by the persons named in the section which might be material to be known by applicants for shares. Lord

BRAMWELL and KELLY, C.B., thought that the words "any contract" ought to be still further restricted, but this opinion did not prevail. In *Twycross v. Grant* (6), the jury found as facts that the plaintiff took his shares on the faith of the statements of the prospectus, and that if the contracts there in question had been disclosed or referred to in the prospectus the plaintiff would not have taken the shares. They also found that the defendant *bond fide* believed that the contracts need not have been set forth. The jury found a verdict for the plaintiff, and gave him as damages the full amount he had paid for his shares, although he might have sold them at a premium before he brought his action. The case came before the Common Pleas Division and the Court of Appeal, and the verdict was upheld. The construction put on section 38 in *Twycross v. Grant* (6) by the Common Pleas Division has, I believe, been accepted as sound ever since it was decided—viz., 1877; and on the question of damages, and also on the immateriality of the defendants' belief that section 38 did not apply, the decision in *Twycross v. Grant* (6) was approved, and followed by this House in *Shepheard v. Broome* (9).

Twycross v. Grant (6) did not raise, and therefore did not settle, the very important question whether section 38 does more than make non-disclosure equivalent to actual fraud in the cases to which the section applies. On proof of the non-disclosure of a contract required to be disclosed, the section declares that the prospectus is to be deemed fraudulent on the part of the persons named in the section. No evidence, therefore, of evil intention on their part is required to be given by the plaintiff, and, on the other hand, the section renders proof by them that they had no evil intention immaterial. But an action for damages based on fraud, or on what is to be deemed fraudulent, can only be maintained by a person who can prove that the fraud, or what is to be deemed fraud, of which he complains has caused him damage, and the question arises how is this principle to be worked out when applied to actions based on section 38? The section in terms gives no remedy or cause of action; but it is a remedial section for the protection of applicants for shares against the wiles of promoters

(9) 11 Manson, 283; [1904] A. C. 343; 73 L. J. Ch. 608; 91 L. T. 178; 53 W. R. 111.

and others. It is noteworthy that what is deemed to be fraudulent is the prospectus, and not merely the non-disclosure of a contract required to be referred to. The language of the section is consistent with the view that any one who is induced to take shares by a prospectus which, although honest and true in all its statements, is to be deemed fraudulent, and who has lost his money by so doing, can maintain an action for damages, even although he was not in fact misled in any way whatever. He may have relied only on statements which were true, and the non-disclosed documents may be such that he would have attached no importance to them if he had known of them. The language of the statute is open to such a construction ; but if so construed it leads to a result which is so unjust and so inconsistent with the principles which govern actions for damages occasioned by fraud that some other interpretation consistent with the language of the section and with established principles ought to be sought for, and, if found, ought to be adopted.

The difficulty has been observed and commented upon in several cases. In *Sullivan v. Mitcalfe* (4), which arose on demurrer, Lord Justice THESIGER, after approving the decision in *Twycross v. Grant* (6) on section 88, said that "no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." Lord BRAMWELL adhered to the opinion which he had expressed in *Twycross v. Grant* (6), and on the construction of the first part of section 88 did not agree with Lord Justice THESIGER. But, on principle, I think Lord Justice THESIGER was right. Lord BLACKBURN, in his well-known judgment in *Smith v. Chadwick* [1884] (10), pointed out that a plaintiff who sues for damages by reason of having been induced by a fraudulent prospectus to take shares in a company must prove both fraud and damage to himself occasioned by such fraud. *Smith v. Chadwick* (10) did not turn on section 88, but that section says no more than that a prospectus shall be deemed

(10) 9 App. Cas. 187; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687; 58 J. P. 644.

fraudulent against certain persons if it does not disclose certain documents.

But proof that a document is fraudulent is not all that a plaintiff must prove in order to recover damages. He must further prove damage occasioned to himself by the fraud of which he complains. Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by section 38, and that he obtained them and paid for them and lost his money is *prima facie* evidence, but only *prima facie* evidence of damage by fraud on himself. *McConnell v. Wright* [1903] (11) goes no further than this. But if the plaintiff is challenged on this point, he must go a step further, and prove that he was misled by what makes the prospectus fraudulent—*i.e.*, the omission to disclose some document which ought to have been disclosed. This was the view taken in *Nash v. Calthorpe* (8), which, in my opinion, was correct. And it is noteworthy that Lord Justice ROMER agreed with the decisions of the Court of Appeal in *McConnell v. Wright* (11), and also in the later case of *Nash v. Calthorpe* (8), which was not decided until after the cases before your Lordships came on for trial.

Another question which has been much discussed is the meaning of "knowingly issued" in the second part of section 38. It is necessary to prove that the defendant knowingly issued the prospectus; and this has been held to mean issued the prospectus knowing of a contract such as is described in the section, and knowing that the prospectus did not disclose it. The fact that a defendant honestly but erroneously believed that the section did not apply to a particular contract of which he knew will not protect him from liability. This was decided in *Twycross v. Grant* (6), and by this House in *Shepheard v. Broome* (9).

The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus, but who never knew of the existence of a contract which ought to be disclosed. I cannot,

(11) 10 *Manson*, 38; [1903] 1 *Ch.* 546; 72 *L. J. Ch.* 347; 88 *L. T.* 431;
51 *W. R.* 661.

however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section, but who forgot all about it when he issued a prospectus not referring to it. Whether such a director could be properly convicted on an indictment for fraud, or for something short of it, is quite another question, which your Lordships have not to consider. I have already pointed out that no intent to deceive is necessary to support a civil action for damages based on section 38. I will merely observe that in common parlance persons talk of knowing perfectly well what for the moment is not present to their mind, and even what they cannot at the moment recall to their memory.

With these observations on the construction and legal effect of section 38, I pass to its application to the cases before your Lordships. The Standard Company was promoted by the Globe Company, and the prospectus of the Standard Company stated that in the formation and issue of that company there were no promoters' profits in any shape or form whatever. This statement has been proved to be true. But there was a contract, dated 27 October, 1898, and made between the Globe Company and the Standard Company, by which the Globe Company agreed to transfer to the Standard Company 5,000 fully-paid up deferred shares of 1*l.* each in the Austin Friars Syndicate; and in consideration of this transfer the Standard Company was to allot and issue to the Globe Company 40,000 fully-paid up shares of 1*l.* each of the Standard Company. This agreement was unfortunately not disclosed in the prospectus of the Standard Company. But I cannot doubt for a moment that it fell within the first part of section 38 of the Companies Act, 1867, and ought to have been referred to in the prospectus. It was a contract which any prudent applicant for shares in the Standard Company would have desired to understand before he took shares in the Standard Company, and was in that sense to that extent material, as explained in *Twycross v. Grant* (6). Every Judge who has had to consider this question has come to the same conclusion, and to my mind this part of the case is so clear that it is unnecessary to say more about it. The prospectus was not issued until May, 1899, and the defendants were directors when it was issued, and when shares were allotted to persons who were

induced by it to apply for shares in the Standard Co. All the plaintiffs in these actions did so apply. How it came about that the contract of 27 October, 1898, was not disclosed is by no means clear; but, whatever the real explanation may be, it was certainly not intentionally omitted by any of the defendants to these actions. It is clearly proved, and is now admitted, that, whether legally liable or not, they are all innocent of any fraudulent misstatement or concealment.

Nevertheless, section 88 entitles the plaintiffs to have the prospectus treated as fraudulent, and the next question is, have the plaintiffs or any of them proved that they have sustained any damage by reason of the non-disclosure of the contract of 27 October, 1898? The plaintiffs took shares on the faith of the prospectus, and they have lost their money. This is their case; but it is at most only a *prima facie* case, and when the facts are more closely investigated it is difficult to believe that a knowledge of the deed of 27 October, 1898, would have induced any of them to abstain from applying for shares. In the first place, the examination and cross-examination of the plaintiffs shows conclusively that the plaintiffs paid no attention whatever to the documents which were disclosed, and if another had been added to their number the result would have been the same. But, further, the contract of 27 October, 1898, when understood, turns out to be an ingenious but perfectly honest transaction, entered into in order to facilitate the acquisition by the Standard Co. of the preferred shares of the Finance Syndicate, all the shares of which the Standard Co. was formed to acquire. The contract conferred no profit whatever on the Globe Co., and, so far from disproving the statement in the prospectus that there were no promoters' profits, the contract shows that none were or could be made out of the transaction to which the contract related. In short, it is, in my opinion, plain that the non-disclosure of this contract has not caused any damage whatever to the plaintiffs or any of them.

But, even if I am wrong in coming to this conclusion, I am of opinion that the defendants are entitled to be protected by the plaintiffs' agreements to waive any fuller compliance with section 88 than is contained in the prospectus. This is a case in which all the defendants are honest men. If they are liable, they are so by

reason of an unfortunate mistake on their part. None of them had the slightest intention to keep back anything. Whether the same can be said of all the other directors I do not know. In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied upon as a protection against trickery; but in the first of these, *Greenwood v. Leather Shod Wheel Co.* (8), it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands. These actions are instances in which the defendants can justly claim the protection of the waiver clauses contained in the prospectus and application for shares.

For these reasons I have come to the conclusion that both appeals should be allowed, and the actions be dismissed with costs both here and below.

Appeals allowed.

Solicitors: *Burn & Berridge*, for the Appellants in the first appeal.

Gilbert Robins, for the Appellant in the second appeal.
Richardson & Co., for the Respondents in both appeals.

ASHTON GAS CO. v. ATTORNEY-GENERAL (1).

1905, November 21. H. L.

Gas Company—Dividend—Maximum Rate fixed by Statute—Payment of Dividend Free of Income Tax—Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 54, 60, Sched. (A.) No. III., 3—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40—Ashton Gas Act, 1877 (40 & 41 Vict. c. clxxxvi.), ss. 16, 18, 19.

Where a gas company is prohibited by its special Act from paying a dividend in excess of a specified rate, it cannot pay dividends at the maximum rate free of income tax. In calculating the maximum dividend payable, income tax on the dividend must be included.

Decision of the Court of Appeal (2) affirmed.

APPEAL from an order of the Court of Appeal (VAUGHAN WILLIAMS, L.J., ROMER, L.J., and COZENS-HARDY, L.J.) dated 22 June, 1904, affirming an order made by BUCKLEY, J., on 26 January, 1904, in an action in which the *Attorney-General* at the relation of the mayor, aldermen, and burgesses of the borough of Ashton-under-Lyne and the corporation were plaintiffs and the present appellants were defendants.

The question was whether the maximum dividends to which the shareholders of the company were entitled under the special Acts regulating the company could properly be paid free of income tax, or whether such dividends ought only to be paid after deducting income tax therefrom. The company was incorporated by the Ashton Gas Act, 1847 (10 & 11 Vict. c. cci.), for the purpose of supplying gas to the town of Ashton-under-Lyne and the neighbourhood, and was regulated by the provisions of such Act as amended by the Ashton Gas Act, 1877 (40 & 41 Vict. c. clxxxvi.). The 16th section of the Ashton Gas Act, 1877, was as follows: "16. Except as in this Act provided, the profits of the company to be divided among the shareholders in any year shall not exceed the rate of ten pounds per centum per annum (which rate is in this Act referred to as 'the standard rate of dividend') on the ordinary share capital or stock of the company authorised by Parliament and paid up." Sections 18 and 19 provided that if the "clear profits" of the undertaking in any year should amount to

(1) *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Robertson, and Lord Lindley.

(2) [1904] 2 Ch. 621; 73 L. J. Ch. 673; 53 W. R. 49; 65 J. P. 477; 20 T. L. R. 83.

a larger sum, the excess might be invested and form an insurance fund, or carried to the credit of divisible profits for the next year.

The company had for many years past not only paid to its shareholders in each year the maximum dividends which could be lawfully paid to them having regard to the price from time to time charged by the company for gas, but had paid such dividends free of income tax, that was to say, it had paid and borne the tax for the shareholders, who had been relieved from the payment of the tax. The corporation, who were large consumers of the company's gas and interested in the price thereof being reduced as low as possible, being advised that the payment of the maximum dividends free of income tax was illegal and having obtained the *fiat* of the Attorney-General in that behalf instituted this action, asking for a declaration that according to the true construction of the Ashton Gas Acts, 1847 and 1877, the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable for that year in respect of income tax on the profits to be divided, and an injunction on the footing of such declaration (3).

The Courts below decided that the company was not entitled to pay the maximum dividend tax free.

H. Terrell, K.C., and W. M. Cann, for the appellants :

The company has on its own account paid the income tax on the net profits as a whole, and this being so there is nothing to

(3) Sections 40 and 54 of the Income Tax Act, 1842, provide for the taxation under the Act of corporations and companies. Section 60: "The duties hereby granted and contained in the said schedule marked (A.) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of the Act, and to refer to the said duties, as if the same had been inserted under a special enactment." Schedule (A.), No. III. "The annual value of all the properties hereinafter described shall be understood to be the full amount

for one year, or the average amount for one year, of the profits received therefrom within the respective times therein limited. . . . Third—of iron-works, gasworks, . . . on the profits of the year preceding." The Income Tax Act, 1853. s. 40, provides that every person liable to the payment of rent, &c., or other annual payment, shall be entitled to deduct the amount of duty, and that the amount of such deduction shall be allowed by the person to whom such payment is made.

prevent its paying the maximum dividend. It is immaterial whether the company or the individual shareholders pay. There is nothing about income tax in the Ashton Gas Act, 1877, and the statutory requirement limiting dividends has been strictly complied with ; the "clear profits" mentioned in sections 18 and 19 of that Act mean the net profits after deduction of tax. The respondents' contention would involve payment twice over—by the company as a whole, and also by the individual shareholders, and is inconsistent with *Gilbertson v. Fergusson* [1881] (4) and *London County Council v. Attorney-General* [1900] (5). In *Last v. London Assurance Corporation* [1885] (6), upon which reliance was placed by VAUGHAN WILLIAMS, L.J., below, the bonuses were avowedly profits, and the distinction drawn was between policy-holders who participated and those who did not participate in profits.

Danckwerts, K.C. (*R. J. Parker* with him), was contending that the profits, being the subject assessed, must be ascertained before assessment, when he was stopped.

H. Terrell, K.C., replied.

The LORD CHANCELLOR (EARL OF HALSBURY) : But for the somewhat complex character of the dividend arrangements of this company I should say that this is a clear case. There are two things which give rise to confusion. In the first place, this action only indirectly raises the question what is to be deducted in respect of income tax. The Legislature has laid it down that the shareholders of this company shall get not more than 10 per cent. dividend on their shares. That seems to me a very clear proposition, and, when one analyses the facts in this case, I should have thought that the whole thing would have been settled in five minutes. In the second place, there is a somewhat difficult and complex machinery which makes the officers of the company officers of the financial department of the Government, for the purpose of collecting the tax. Now, first of all, let us suppose that each

(4) 7 Q. B. D. 562; 46 L. T. 10.

(5) [1901] A. C. 26; 70 L. J. Q. B. 77; 83 L. T. 605; 49 W. R. 686; 65 J. P. 227.

(6) 10 App. Cas. 438; 55 L. J. Q. B. 92; 53 L. T. 634; 34 W. R. 233; 50 J. P. 116.

shareholder is to get 10 per cent. upon his shares ; that is a very plain matter, and what the 10 per cent. is to be can be easily ascertained. But then the particular Act of Parliament which is before us provides that, 10 per cent. being the utmost that the shareholders shall receive, they are in their turn the persons who shall collect the income tax for the Government. Well, let us suppose that we get rid of the machinery altogether, and that the company are relieved from the necessity of collecting the tax for the Government. Let us suppose that, instead of that machinery, the shareholder is left face to face with the Government collectors, and that, instead of acting as the Government receivers, the company simply pays the 10 per cent. to the shareholder and allows the shareholder to make his bargain, or rather to give accounts to the proper Government officer. The company having paid 10 per cent., and it having been ascertained what the proper quota of the shareholder would be in respect of the income tax, suppose the company give to the shareholder, besides the 10 per cent. they have already given him, the quota for the income tax also, will they or will they not have given the shareholder more than 10 per cent. for his dividend ? It is obvious that they will have given him the amount, we will call it x , which is due in respect of dividend *plus* y , which is the amount of the income tax which is due from him.

So presented, the case appears to me to be perfectly clear. The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay, something which alters what is the real nature of the profit. Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit—indeed, profit is a very plain English word—that is what is charged with income tax. But if you confound what is the necessary expenditure to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion, which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income tax is a charge upon the profits ; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax.

You have no right to deduct the income tax before you ascertain what the profit is. The observation of my noble and learned friend brings that out. He cannot understand, neither do I, how you can make the income tax part of the expenditure, which expenditure earns itself. That seems to me to put in a clear form what this really is. I confess I share very much Mr. Justice BUCKLEY's difficulty in understanding how so plain a matter has been discussed in all the Courts at such extravagant length, because it appears to me, once you put the two propositions, "What is it you are taxing ? profits"; and then, "How can you ascertain profits without deducting the income tax itself, which you clearly can and must?" I think these two propositions render the matter absolutely clear from any doubts at all.

In the case of *Last v. London Assurance Corporation* (6), which was decided a good many years ago, one can understand the argument that was there suggested. When you are dealing with the bonuses of an insurance company it was argued : " You pay a bonus to induce people to become shareholders in your undertaking, therefore, it is one of the necessary expenditures to induce people to come in." But the Court of Appeal, and this House afterwards, refused to acquiesce in that argument. They said, "That is not true ; you must ascertain first the income, you must ascertain what the income tax is levied upon"; that is to say, the profit of the undertaking is first to be ascertained, and when you have found out what the profit of the undertaking is, you have then to tax that as profit. Really, the whole question comes back to the definition of the word "profits." When once you have defined what the word "profits" means it is perfectly clear what the result of this case must be.

I am of opinion, for the reasons I have given, that the judgment of the Court of Appeal is absolutely right, and I move that the appeal be dismissed with costs.

Lord ROBERTSON: The whole argument of the appellants is rested upon the words of Schedule A. read out of all relation to the subject-matter of the enactments. What has got to be remembered, and not to be ignored, is that Schedule A. merely provides a formula for ascertaining the income arising from the

ownership of lands. It is an artificial and rather elaborate method of estimating income, but what it yields is, on the theory of the Acts, income, none the less than if the question arose under any of the other schedules.

Now, if this be so, there is no room for argument. The view of the appellants really implies that the tax under Schedule A. is not income tax at all; and I am not sure that the reasoning would not lead to the shareholders' own part of the proceeds being taxed over again; this time as income tax.

I entirely agree in the judgment of Mr. Justice BUCKLEY.

Lord LINDLEY: I am entirely of the same opinion. The reasoning of Mr. Justice BUCKLEY's judgment appears to me to be absolutely unanswerable, and although I have listened with great respect to what is an intellectual conjuring trick, I am satisfied that there is nothing in it at all.

Appeal dismissed.

Solicitors: *Burgess, Cossens & Co.*, agents for *A. Buckley*, Manchester, for the Appellants.

Sharpe, Parker, Pritchards, Barham, & Lawford, agents for *F. W. Bromley*, Town Clerk, Ashton-under-Lyne, for the Respondents.

IN RE GLASDIR COPPER MINES, LIMITED, ENGLISH
ELECTRO-METALLURGICAL CO. v. GLASDIR
COPPER MINES, LIMITED.

1905, November 24, 27, 30. C. A. VAUGHAN WILLIAMS, STIRLING
AND COZENS-HARDY, L.JJ.

Company — Debenture-holders' Action — Receiver and Manager — Advances to Receiver and Manager—Advances to Receiver by Debenture-holders—First Charge upon Property Secured by Debentures—Expenses of Management—Receiver's Remuneration—Priority.

A receiver and manager appointed in a debenture-holders' action under orders of the Court borrowed, for preserving the property of the company comprised in the debentures, certain sums, which were advanced by certain of the debenture-holders. The receiver gave in respect of the sums so borrowed formal charges, which were declared to be "first charges" on the property, and provided that the receiver should not be personally liable to repay the advances out of his own moneys. The property charged was realised by the receiver, and proved insufficient to pay the receiver's expenses and remuneration and the sums borrowed :—

Held, that the receiver was entitled to be indemnified in respect of his expenses and remuneration out of the assets realised in priority to the lenders' claims under their charges.

Strapp v. Bull, Sons & Co. (1) considered and followed.

APPEAL from decision of JOYCE, J.

The action was brought by the plaintiffs on behalf of themselves and all others the debenture-holders of the defendant company, to enforce the charges created by the debentures. The debentures were a charge upon the undertaking of the company and all its property, whatsoever and wheresoever, both present and future, and were issued subject to the condition that the charge should be a floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to the debentures.

On 8 February, 1901, C. S. Nicholson was appointed receiver and manager in the usual form.

On 30 March, 1901, judgment was given directing accounts and inquiries. On 3 July, 1901, an order was made that the receiver be at liberty to borrow 500*l.* for the purpose of preserving the property of the defendant company comprised in the debentures, the moneys so borrowed to be a first charge on such property. On

(1) 2 Manson, 441; [1895] 2 Ch. 1; 64 L. J. Ch. 658; 72 L. T. 514; 43 W. R. 641; 12 R. 387.

42 IN RE GLASDIR COPPER MINES, LIMITED, &c. [MANSON,

10 September, 1901, an order was made giving liberty to the receiver to employ an engineer and mining captain and to borrow 200*l.* On 5 February, 1903, an order was made continuing the receiver and authorising him to borrow a further sum of 200*l.* On 11 June, 1903, a further order continuing the receiver was made, and a similar order on 6 August, 1903, also giving leave to borrow 100*l.* Subsequently there was an order for the sale of certain chattels. All the above-mentioned four sums were in fact advanced by the plaintiffs, and on each occasion formal charges were executed, and were declared to be first charges upon the property comprised in or charged by the security created by the debentures, and in each of them it was expressly declared that the receiver should not be personally liable to repay the advances out of his own moneys. The nature of these charges is more particularly stated in the judgment of VAUGHAN WILLIAMS, L.J. The receiver was continued from time to time. Eventually the company's lease was forfeited, and in 1904 there was a sale of certain fixtures and plant comprised in the debenture-holders' security, which realised 1,179*l.* The total proceeds of the property which came into the receiver's hands amounted to 1,468*l.* According to the receiver's accounts which were passed, and a certificate issued, there were no further assets of the company, and there was still due to him a sum of 368*l.*, in which was included his remuneration of 350*l.*

The plaintiffs applied by summons that the receiver might be ordered to repay with interest the sums advanced by the plaintiffs on the security of their charges.

JOYCE, J. held, following *Strapp v. Bull, Sons & Co.* [1895] (1), that the expenses of management and of the receiver ought to come before the charges of the plaintiffs in respect of their loans.

The plaintiffs appealed.

Younger, K.C., and Martelli, for the appellants :

Where an order is made in a debenture-holders' action, upon which all the persons interested are present, allowing the receiver to borrow in priority to the debentures, the persons interested must be taken to be willing that their property should be charged in favour of the persons making the advance in priority to them or any one

else. The charge is to take priority of everything except the costs of making the advance. That is the case where the person making the advance is a stranger—a banker, for instance. Persons in that position will rank in priority to the receiver's expenses and remuneration. *Strapp v. Bull, Sons & Co.* (1) is an authority for that. The Court apparently were of opinion that, as regards strangers, that must be taken to be part of the bargain between the parties, as strangers cannot be made to contribute to the costs of litigation to which they are not parties, though in the particular case they considered that the persons who advanced the money could not take up that position. There is no difference for this purpose between a stranger advancing money and a debenture-holder, a party to the action, advancing money under a separate contract. He is only one of several, and is in the same position as any other person: *Lathom v. Greenwich Ferry Co.* [1895] (2).

[COZENS-HARDY, L.J.: Is not a receiver appointed by an order of the Court the agent of the parties? See *Chinnery v. Evans* [1864] (3).]

He may be for certain purposes. In that case he was so for the purpose of taking a case out of the Statute of Limitations, but he is not agent to contract for anybody. When he orders goods he pledges his personal credit even though he says he gives the order as receiver, and he has to look to the assets for his indemnity: *Owen & Co. v. Cronk* [1894] (4) and *Burt v. Bull* [1894] (5).

At the most, all that the receiver could charge as against the persons making this advance are the costs of realising the property: *Lathom v. Greenwich Ferry Co.* (2), *Batten v. Wedgwood Coal and Iron Co.* [1884] (6), and *In re Bushell, Ex parte Izard* (No. 1) [1883] (7).

(2) 2 Manson, 408; 72 L. T. 790; 13 R. 503.

(3) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. N. S. 855; 11 L. T. 68; 13 W. R. 20.

(4) 2 Manson, 115; [1895] 1 Q. B. 265, 275; 64 L. J. Q. B. 288, 292; 14 R. 229.

(5) 2 Manson, 94; [1895] 1 Q. B. 276, 279, 283; 64 L. J. Q. B. 232, 234, 235; 71 L. T. 810; 43 W. R. 180; 14 R. 65.

(6) 28 Ch. D. 317, 325; 54 L. J. Ch. 686, 689; 52 L. T. 212; 38 W. R. 303.

(7) 23 Ch. D. 75; 52 L. J. Ch. 678; 48 L. T. 751; 31 W. R. 418.

[VAUGHAN WILLIAMS, L.J., referred to *In re Oriental Hotels Co., Perry v. Oriental Hotels Co.* [1871] (8), and *Morison v. Morison* [1855] (9).]

[STIRLING, L.J., referred to *In re New Zealand Midland Railway, Smith v. Lubbock* [1901] (10).]

The charges given by the receiver were under his own hand. They did not reserve any rights to him except that he was not to be personally liable.

[VAUGHAN WILLIAMS, L.J., referred to Palmer's Company Law (5th ed.), p. 356.]

In *In re Regent's Canal Ironworks Co., Ex parte Grissell* [1875] (11), it was held that the fund belonged to the debenture-holders in priority to the claim of the liquidators. Here everything advanced was on the security of charges given under the hand of the receiver. That was not the case in *Strapp v. Bull, Sons & Co.* (1). The receiver may make any bargain he likes within the limits of the order. The only limitation in the charge here was that he was not to be personally liable. There could have been no question, if these charges had been given by an outside person, that he could not set up any claim in priority to the lenders. The receiver can, if he chooses, postpone his claim for expenses and costs of preservation. He purported here to give a first charge, and it cannot be construed as a second charge.

Hughes, K.C., and *A. Adams*, for the respondent:

Strapp v. Bull, Sons & Co. (1) is a complete authority in the receiver's favour. The security was on the property charged by the debentures—that is, the undertaking of the company, which is only what is left after paying all proper expenses. When advances are made by a party to the action he cannot dispute the charges of the receiver. The receiver was appointed by the Court on behalf of all persons interested in the security before the Court.

(8) L. R. 12 Eq. 126; 40 L. J. Ch. 420; 24 L. T. 495; 19 W. R. 767.

(9) 7 De G. M. & G. 214, 223, 224.

(10) W. N. [1901] 105.

(11) 3 Ch. D. 411.

No one before the Court can dispute the receiver's rights as regards the assets, the subject of the security. The receiver is receiver on behalf of every one interested in the success of the company. *Lathom v. Greenwich Ferry Co.* (2) cannot stand if it is inconsistent with *Strapp v. Bull, Sons & Co.* (1). According to *In re New Zealand Midland Railway* (10), KEKEWICH, J., has followed *Strapp v. Bull, Sons & Co.* (1). The effect of the orders here was the same as in the latter case. Had it not been for the acts of this receiver there would be nothing here for anybody. The loans were made for the purpose of carrying on the company's business.

Martelli replied.

Cur. adv. vult.

November 30, 1905.

VAUGHAN WILLIAMS, L.J., read the following judgment: In my opinion, the appeal in this case depends largely upon a right understanding of the decision in the Court of Appeal in *Strapp v. Bull, Sons & Co.* (1). Now, in that case, there was a debenture-holder's action brought by W. Strapp, a debenture-holder, on behalf of himself and all other debenture-holders, for the payment of their debentures. These debentures had been issued by the defendants, Bull, Sons & Co., a joint-stock company, registered under the Companies Acts, which carried on business as builders and contractors, and the company had issued debentures to a considerable amount, which were a first charge upon the undertaking. In that action receivers and managers had been appointed, and on 13 May, 1892, shortly after the commencement of the action and the appointment of the receivers and managers, an order was made on a summons issued by the plaintiff that the receivers and managers should be at liberty to raise a sum of 700*l.* beyond the sum of 1,000*l.* which by a previous order they had been empowered to raise as a first charge on the assets of the company in priority to the securities of the debenture-holders of the company. On 14 May, 1892, a petition was presented for winding up the company, and on 1 June, 1892, an order was made by consent, as well of the petitioners as of the plaintiff in the debenture-holder's action, that the 5,000*l.*, which there was liberty to raise under the previous orders in the debenture-holder's action, should be a first charge on

all the assets in priority to all the debentures, and that second debentures should be issued to the unsecured creditors for the principal moneys owing to the unsecured creditors at that date, and that the unsecured creditors, or some of them, should advance two-thirds of the above-mentioned sum of 5,000*l.*, and that Strapp should advance the remaining one-third as and when the same was required for carrying on the works. The debentures issued to the unsecured creditors for the principal moneys owing to them were to be in the same form as those issued to Strapp, and to rank *pari passu* with them. The winding-up petition was ordered to be adjourned for six months. The petitioners were made defendants in the debenture-holder's action, and pending the adjournment it was ordered that the company should contract no further debts and liabilities. The 5,000*l.* to the extent of 4,250*l.* was raised in pursuance of the consent order—1,750*l.* by Strapp, and 2,500*l.* by some of the unsecured creditors; but it does not appear that the receivers entered into any written contract with the lenders, or that there was any conventional security; but I suppose the sums advanced were, as often is the case, indorsed upon the order giving the liberty to raise the loan. In such cases there is nothing to negative the receiver's *prima facie* right to indemnity as against debenture-holders as distinguished from strangers. The loans were used for the purpose of carrying out and completing three contracts with the School Board for London, which necessarily involved large outlay and expenditure in respect of wages and materials. The persons by whom materials were supplied brought actions against the receivers and managers personally to recover the price. The receivers and managers claimed to be indemnified in respect of all sums due to them as receivers and managers, and in respect of all liabilities incurred by them in that capacity, out of all the assets of the company, including the sums due from the School Board, in priority to the unsecured creditors, who claimed in respect of the advances made by them under the consent order; and a motion was made by the receivers and managers claiming priority over the unsecured creditors. The judgment appealed from did not decide the rights of Strapp, but refused a declaration in favour of the receivers and managers so far as it related to the unsecured creditors. That judgment was reversed by the Court of Appeal on the ground

that the unsecured creditors had placed themselves in the position of the debenture-holders on whose behalf the pending action had been brought, and that, as against such debenture-holders, the receivers and managers had a right to be indemnified out of the assets in priority to debenture-holders, even though the debenture-holders might have advanced money on the first charge on all the assets in priority to all the debentures.

The present case raises a similar question as to priorities, but there is this important difference in the facts—that in the present case the receiver entered into contracts with the plaintiffs in the debenture action, who advanced sums from time to time to enable the business, the subject of the debenture deed, to be carried on. By the first of these charges, after reciting that by an order made 3 July, 1901, it was ordered that the receiver should be at liberty to borrow a sum not exceeding 500*l.* at interest not exceeding 5 per cent. for the purpose of preserving the property of the Glasdir Copper Mines, Limited, the moneys so borrowed to be a first charge on such property; and also reciting that the receiver had applied to the English Electro-Metallurgical Co. (that is, to the plaintiffs in the debenture-holders' action, their name having been changed before the loans were made) to lend him the sum of 107*l.* 7*s.*, part of the said sum which the receiver was authorised by the said order to borrow as a first charge upon the said property; and that the English Electro-Metallurgical Co. had agreed to lend the said sum accordingly; it was witnessed that the sum of 107*l.* 7*s.* had been paid by the English Electro-Metallurgical Co., and that the said sum, together with interest at the rate of 5 per cent. per annum, should be a first charge upon the property comprised in or charged by the security created by the said debentures, but that the receiver should not be personally liable to repay the said sum out of his own moneys. The indenture then proceeds: "and the receiver agrees with the English Electro-Metallurgical Co., Limited, that he will at all times hereafter execute and do all such assurances and acts as shall be reasonably required for effectually vesting the said premises hereby charged in the English Electro-Metallurgical Co. and its assigns as security for the said sum of 107*l.* 7*s.* and interest." The subsequent orders and charges were substantially in the same form, except that each successive charge made the last

charge subject to the prior charges, which were particularly stated in each case.

It was urged before us that the effect of these charges to which the receiver was a party was (notwithstanding the fact that the receiver was to incur no personal liability) that the receiver personally contracted that the plaintiffs, although debenture-holders and plaintiffs in the debenture-holders' action, should have a first charge, and that such first charge entitled the plaintiffs, as lenders, to be paid first out of the sum realised by the sale of the property charged, subject only to the payment of the costs of realisation; and it was contended that the effect of this contractual charge took the case outside the decision of the Court of Appeal in *Strapp v. Bull, Sons & Co.* (1). Now, I think that the cases of *Owen & Co. v. Cronk* (4) and *Burt v. Bull* (5) establish that when a receiver and manager is appointed by the Court he accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate. And I think that these cases further establish that such a receiver, although appointed for the benefit of the debenture-holders, is not the agent to contract, either of the Court or of anybody else, but is a principal; and, in my opinion, although it is plain that, as between the receiver and the debenture-holders there is a strong presumption that every contract properly entered into by the receiver appointed by the Court, acting as such, is entered into on the basis that the receiver is entitled to be indemnified out of the assets before the debenture-holders take anything, yet I think that this is a presumption which can be rebutted, and that it could be rebutted by a contract between the receiver and a debenture-holder lending money to the receiver for the purposes of the management and preservation of the estate by an express or implied term that the receiver would postpone his right of indemnity to the right of a lender under such a charge. The question therefore is: Do we find such a term in the present charge? I do not think that the employment of the words "first charge" is sufficient. I do not think that these words displace the presumption. Nor do I think, having regard to the succession of charges in this case, that the express mention of the prior charges operates to exclude the presumption which I have mentioned and the receiver's *prima facie* right to be

indemnified before any one of the debenture-holders, for whose benefit the estate is being managed, preserved, and realised, receives anything. Taking this view, it is not necessary for me to consider whether the plaintiff could have enforced his remedies while the business was being carried on by the receiver. And, moreover, in this case the business had ceased to be carried on at the moment when the question of priorities in this case arose.

STIRLING, L.J., read the following judgment: The main argument in this case was that the case was covered by the decision of the Court of Appeal in *Strapp v. Bull, Sons & Co.* (1). The circumstances of that case are somewhat complicated, and differ from those in the present case, and therefore I think it desirable to examine in the first place what was in fact decided in that action. In *Strapp v. Bull, Sons & Co.* (1) an action was brought by the plaintiff Strapp, a debenture-holder of the defendant company, on behalf of himself and all other debenture-holders, against the company, seeking the ordinary relief. Receivers and managers were appointed, and orders were made in the action authorising them to borrow to the extent of 5,000*l.* on the security of a first charge on the assets. Subsequently unsecured creditors of the company presented a petition for winding up, which was approved by the debenture-holders. An order was made by consent dated 1 June, 1892, in the matter of the winding-up, to the effect that the 5,000*l.* directed to be raised in this debenture-holders' action, and interest thereon, should be a charge on all the assets in priority to all the debentures, that secured debentures should be issued to the unsecured creditors of the company to the amount of their debts, and that the unsecured creditors, or some of them, should advance two-thirds of the above-mentioned sum of 5,000*l.*, and that the plaintiff Strapp should advance the remaining third, as and when the same should be required for carrying on the works. Subsequently one of the receivers and managers was replaced by another to represent the unsecured creditors, and unsecured creditors were also added as defendants in the debenture-holders' action. To them advances were made by Strapp and some of the unsecured creditors in the terms of the order. The property of the company was realised by the receivers and managers; but the result was

unfortunate, and the question was raised on behalf of the unsecured creditors who had made advances whether they were not entitled to be paid their advances in priority to the costs and expenses, properly secured, incurred by the receivers. In the Court of first instance the contention of those who had made the advances prevailed, but the decision was reversed in the Court of Appeal. It was held, first, that the case must be dealt with on the same footing as if the order of 1 June, 1892, had been made in a debenture-holder's action brought by a first debenture-holder on behalf of himself and all other debenture-holders of that class against the company and second debenture-holders, and, secondly, that in that state of circumstances the claims of the receivers to their costs must be allowed. It is the decision on the second point which mainly affects the present case, and reasons for it are stated by the LORD CHANCELLOR (Lord HALSBURY) and Lord Justice LINDLEY. Lord HALSBURY said: "I do not concur in the idea that it ever could have been contemplated that those who were to take upon themselves the burthen of management and receivership should be left to speculate whether or not they would ever get paid anything. It was an essential part of the arrangement that someone should manage this business, and it was necessarily implied in that arrangement that those who for the benefit of all concerned, and not merely for themselves, were entering into this arrangement, and were carrying it on to its completion, so that there should be an ultimate resulting fund capable of being divided, should themselves be indemnified for whatever they were doing, namely, carrying on these contracts; and if you look, not at each order separately by itself, but at the whole of the orders as one arrangement to which all were parties, and all tending to the same thing, it seems to me really to be free from doubt that that was the real meaning of the transaction." Lord Justice LINDLEY said: "Now I cannot agree in thinking that VAUGHAN WILLIAMS, J.'s view is correct that on the true construction of these orders the receivers and managers are to lose everything, and are to have no indemnity at all in respect of any liabilities they may have incurred, assuming that they have incurred them properly, and that they come in respect of their indemnity after those for whose benefit they were working. It cannot be that they are to be regarded as not having anything more to do

with the action than outside creditors. That is not their position at all."

It is to be observed that the case dealt with by the Court of Appeal was that of the unsecured creditors of the company who made advances; but Strapp, the plaintiff in the action, also made advances; and in the Court of first instance reference was made to his position. The learned Judge, though he gave no final decision on the point, appears to have thought that there was great difficulty in holding that Strapp was entitled to priority over the receivers and managers; and, regard being had to the decision of the Court of Appeal, it is clear that he was in no better position than the second debenture-holders who were postponed to the receivers and managers.

The case, therefore, is an authority for the proposition that, where advances are made to a receiver and manager by a party to a debenture-holder's action under an order of Court which directs that the sums advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver and manager is nevertheless entitled to take his costs and expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realised by the receiver and manager for the benefit of all concerned. In the present case the circumstances are different. There are no second debenture-holders. The orders made by the Court do not create a charge, but simply give liberty to the receiver and manager to borrow on the security of charges to be created by him. The receiver and manager has availed himself of the liberty, and has borrowed from the plaintiff in the action, and has created charges in his favour. By each of those charges he has expressly stipulated that he shall not be personally liable to repay the sums advanced out of his own moneys; but he has not made any express reservation of his right to be indemnified out of the assets in respect of his costs and expenses properly incurred. And it is said that, having regard to the terms of the instruments creating the charges, he cannot claim those costs and expenses in priority to the plaintiffs' advances. The contention is similar to that put forward on behalf of the persons who made the advances in *Strapp v. Bull, Sons & Co.* (1). Notwithstanding the terms of the order of 1 June, 1892, in that action, the Court examined into the real nature of the transaction;

and, in my judgment, the Court ought to do so here, and ascertain whether the orders (all of which were made on the plaintiffs' application) and the charges in the plaintiffs' favour were or were not made and given on the basis that the assets should be realised by the receiver for the benefit of all concerned. It seems to me plain, on the face of these orders themselves, that the advances were made in order that the assets might be better or more advantageously realised by the receiver and manager. Thus the first order authorises the borrowing "for the purpose of preserving the property of the defendant company"; the second, "to employ an engineer and mining captain to superintend the working of the defendants' mine with a view to the preparation of a report to be used in procuring a purchaser for the said mine"; the third, "for the purpose of the payment of expenses for keeping the mine free from water, payment of rent to the lessors, and for the maintenance of the mine"; and the fourth, "for the payment of expenses for keeping the mine free from water, and for the maintenance of the mine." Though the orders give liberty to create charges by way of security for the sums advanced, I do not think that it was contemplated that those securities should be created in such a form as to confer an absolute right on the person making an advance to step in and himself realise the subject-matter of the securities whenever he thought proper. The securities created no personal liability and could not be enforced against the property charged (which was in the hands of an officer of the Court) without the leave of the Court; and it seems to me that the Court would not grant leave unless a case was made out for putting an end to the management, and realisation of the property by the receiver. However, no application was made to enforce the securities, and the receiver was allowed to complete the realisation of the property, which has turned out disastrously. In my opinion, the orders were made, and the securities given and taken, in the expectation of all parties that by means of the money advanced the receiver would be enabled to realise the property more advantageously—that is to say in such a way as not only to repay the advances, but to pay something to the debenture-holders. Things have turned out very differently; but inasmuch as the receiver, in my view, acted in the realisation of the assets for the benefit of everyone concerned, I

think that he is entitled to indemnity out of the assets in priority to those for whose benefit he was acting.

I agree with the decision of Mr. Justice Joyce, and think that the appeal fails.

COZENS-HARDY, L.J., read the following judgment: Apart from authority, I think there is great force in the argument that when the Court has taken the administration of an undertaking into its own hands by means of an officer appointed to manage the undertaking, and finds it proper to procure money in order that the undertaking may be preserved or carried on to greater advantage with a view to ultimate realisation, it can make no difference whether the person who finds the money is an outsider or is a party to the action. No personal liability to repay is contemplated in either case. The lender gets only a charge on the undertaking; and I doubt whether he can, by virtue of such a charge, stop the business. My impression is that his only right is to have repayment out of the proceeds of the undertaking as and when realised. And it might well be held that any person advancing money under these circumstances could not deprive the officer of the Court of his proper demand for work done and services rendered in the course of the carrying on and winding-up of the business. But, having regard to the observations of the LORD CHANCELLOR in *Strapp v. Bull, Sons & Co.* (1), which were concurred in by his colleagues, I do not feel at liberty to say that there is not a difference between the position of a stranger and that of the plaintiffs. The Court will, however, not lightly assume that the undoubted claim of a receiver and manager to indemnity has been overridden and defeated by an order to which he is not a party, and on the making of which he would not be entitled to be heard. It presumes, in the case of a party to the litigation who finds the required money, that the money is found on the understanding that the receiver and manager is acting for such party, not merely in his original character, but also in his fresh character of money-lender. In short, the receiver and manager is considered to be carrying on the business with a view to realisation for the benefit of all whom it may concern, being parties to the action either individually or by representation. It follows that the receiver and manager is entitled to priority. This

is only a *prima facie* rule. It must yield to express language, and, of course, the receiver and manager may waive or postpone his right. These are the conclusions I draw from *Strapp v. Bull, Sons & Co.* (1).

In the present case I find nothing in the orders of the Court sufficient to negative the presumption. My doubt has arisen on the terms of the documents executed by the receiver in favour of the plaintiff. But upon the whole I think they were only intended to give effect to the orders of the Court, and were not intended to enlarge the operation and effect of these orders. The proviso exempting the receiver from personal liability does not suffice to lead me to infer that he intended to waive his right to indemnity. I think it would be desirable in future that orders of this nature should expressly state whether the charge is to be subject to or free from the receiver's claim.

Appeal dismissed.

Solicitors : *Maddison, Stirling & Humm*, for the Appellants.

Godden, Son & Holme, for the Respondent.

IN RE CALGARY AND EDMONTON LAND CO.,
LIMITED AND REDUCED.

1905, December 12, 19. BUCKLEY, J.

Company—Capital in Excess of Wants of Company—Reduction by Return of Capital—Form of Minute—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 15—Companies Act, 1877 (40 & 41 Vict. c. 28), ss. 3, 4.

A company passed a resolution to reduce its capital, which was in excess of its wants, from 241,510*l.* in shares of 1*l.* each to 211,321*l. 5s.* in shares of 17*s. 6d.* each, the reduction to be effected by returning 2*s. 6d.* per share to each of the shareholders. Upon a petition to confirm the reduction, the Court gave leave to return 2*s. 6d.* per share, and, subject to the production of evidence that the 2*s. 6d.* had, in fact, been repaid, ordered (the order to be postdated) that the reduction be confirmed, and approved a minute to be registered under section 15 of the Companies Act, 1867, as follows: "The capital of the Calgary and Edmonton Land Co., Limited, is henceforth 211,321*l. 5s.* divided into 241,510 shares of 17*s. 6d.* each, instead of the original capital of 241,510*l.* divided into 241,510 shares of 1*l.* each. At the time of the registration of this minute the sum of 17*s. 6d.* has been and is to be deemed paid up upon each of the said shares."

PETITION.

The above-named company was incorporated in 1902, under the Companies Acts, 1862 to 1900, as a company limited by shares with a capital of 241,510*l.* divided into 241,510 shares of 1*l.* each.

All the shares had been issued, and were either fully paid up in cash or credited as fully paid up.

The articles of association provided that the company might by special resolution reduce its capital by paying off capital or otherwise as therein mentioned.

The capital of the company was in excess of its wants to the extent of 30,188*l. 15s.* and upwards.

By resolution passed in accordance with section 51 of the Companies Act, 1862, on 15 May, 1905, and confirmed as a special resolution on 2 June, it was resolved that the capital of the company be reduced from 241,510*l.* divided into 241,510 shares of 1*l.* each to 211,321*l. 5s.* divided into 241,510 shares of 17*s. 6d.* each, and that such reduction be effected by returning to the holders of shares of the company paid-up capital to the extent of 2*s. 6d.* per share, and by reducing the nominal amount of all the shares from 1*l.* to 17*s. 6d.*

The form of minute proposed to be registered pursuant to section 15 of the Companies Act, 1867, was as follows: "The capital of the Calgary and Edmonton Land Co., Limited, is henceforth 211,821*l.* 5*s.* divided into 241,510 shares of 17*s.* 6*d.* each, instead of the original capital of 241,510*l.* divided into 241,510 shares of 1*l.* each. Such reduction has been effected by returning to the holders of the said 241,510 shares, all of which have been issued and are credited as fully paid up, capital to the extent of 2*s.* 6*d.* per share and by reducing the nominal amount of all the shares from 1*l.* to 17*s.* 6*d.* fully paid."

The 2*s.* 6*d.* per share had not, in fact, been returned to the shareholders.

The company now presented this petition for the confirmation by the Court of the special resolution and for approval of the minute in the form proposed.

Younger, K.C., and Bischoff, for the company:

The order asked for may be made at once. The minute is in proper form, although the 2*s.* 6*d.* per share has not yet been actually repaid, for, so soon as the resolution is sanctioned by the Court, each share becomes thereupon *ipso facto* of the lesser amount, and is 17*s.* 6*d.* only and not 1*l.*, but the amount by which it has been reduced is a debt due from the company.

[*Frank Evans, amicus Curiae*, referred to *In re Fore Street Warehouse Co., Limited* (1888), before KAY, J., mentioned in Palmer's Company Precedents (8th ed.), Part I., p. 1150, and *In re Artisans' Land and Mortgage Corporation* [1904] (1).]

BUCKLEY, J., intimated that the Court would confirm the reduction, but reserved judgment for a week as to the form of the order, giving liberty to commence repayment of 2*s.* 6*d.* per share at once.

Cur. adv. rult.

December 19.

BUCKLEY, J.: Section 11 of the Companies Act, 1867, empowers the Court to make an order confirming a reduction of capital which

(1) 12 Manson, 98; [1904] 1 Ch. 796; 73 L. J. Ch. 581; 52 W. R. 330.

has been specially resolved on by a company, and the Act proceeds, in section 15, to provide that "the Registrar of Joint Stock Companies upon the production to him of an order of the Court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court), showing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares in which it is to be divided, and the amount of each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect." Then, by the same section, the Registrar is to certify the registration of the order and minute, "and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute." The Companies Act, 1877, by section 3, added to the powers of reduction of capital already allowed by the Act of 1867 a power to reduce capital by paying off any capital which might be in excess of the wants of the company, and section 4 provided that the minute required to be registered in the case of reduction of capital should show, in addition to the other particulars required by law, "the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share."

The petition in the present case asks for an order to confirm a reduction by reducing the capital of the company from 241,510*l.* divided into 241,510 shares of 1*l.* each to 211,321*l.* 5*s.* divided into 241,510 shares of 17*s.* 6*d.* each, and for approval of a minute which states that "such reduction has been effected by returning to the holders of the said 241,510 shares capital to the extent of 2*s.* 6*d.* per share and by reducing the nominal amount of all the shares from 1*l.* to 17*s.* 6*d.* fully paid." The question upon which I adjourned the matter for consideration a week ago was whether I could properly make that order and approve a minute to the effect that the capital of the company was only in shares of 17*s.* 6*d.* before the statement had been rendered a true one by the return of 2*s.* 6*d.* per share to the shareholders having been first made. In my judgment I cannot do so. I was anxious to search with a view to

seeing whether I could trace in the course of my own experience at the Bar a case—for, if my recollection is to be trusted, I have had numbers of such cases—in which the practice followed was this: first, to make an order confirming the reduction, then to allow the further hearing of the petition to stand over in order that an affidavit might be supplied showing that the repayment had been made, and then to postdate the order, referring therein to the affidavit and approving a minute stating what would then be the truth. On my books being searched many references have been found to orders confirming reductions of capital, but it is not easy to trace those in which the reduction confirmed was by returning capital. I did find one reference to such an order, but although I have obtained a copy of the order, it throws no light on the question. I have not thought it desirable to delay the matter in order to make a further search.

These minutes are matters to which the Court is bound to give very careful attention, having regard to the provision in section 15 of the Act of 1867 that the Registrar's certificate is to be conclusive evidence "that the capital of the company is such as is stated in the minute." The resolution is quite right—namely, "that the capital of the company be reduced from 241,510*l.* divided into 241,510 shares of 1*l.* each to 211,321*l.* 5*s.* divided into 241,510 shares of 17*s.* 6*d.* each, and that such reduction be effected by returning to the holders of shares in the company paid up capital to the extent of 2*s.* 6*d.* per share and by reducing the nominal amount of all the shares from 1*l.* to 17*s.* 6*d.*" Also the proposed minute will be right so soon as it is proved that 2*s.* 6*d.* per share has been returned to the shareholders, but until that payment has been made the proposed minute is not true. But then it is said that I ought to treat the matter in this way: that, though the 2*s.* 6*d.* per share has not been repaid, yet, so soon as the special resolution which has been passed is confirmed by the Court, each share is thereupon *ipso facto* 17*s.* 6*d.*, and the other 2*s.* 6*d.* is not capital at all, but a debt owing by the company to the shareholder. But that argument gives rise to the difficulty that if the 2*s.* 6*d.* is not capital it cannot be returned, because what is to be returned under section 8 of the Act of 1877 is "capital which is in excess of the wants of the company." In my opinion the 2*s.* 6*d.* is capital

until it is returned. It has been subscribed as capital, and represents in the hands of the company moneys subscribed by the corporators in respect of a liability of 2*s.* 6*d.* upon each of their shares. Until that has ceased to be the fact a minute stating that the capital is a smaller sum cannot, I think, be properly approved. Orders have in some cases been made confirming reductions of capital by returning capital upon the footing that the amount returned, or any part thereof, may be called up again. That case was considered by Mr. Justice KAY some years ago, and he thought that such an order was right; and Mr. Justice CHITTY subsequently made similar orders. Suppose this were a case of returning 2*s.* 6*d.* per share subject to recall. The appropriate form of minute to be approved by the Court within section 15 of the Companies Act, 1867, and section 4 of the Companies Act, 1877, would be a minute stating that the share was a share of 1*l.* upon which 17*s.* 6*d.* was "at the date of the registration of the minute proposed to be deemed to have been paid up." It seems to me that, to complete the matter, in cases of return of capital you must, before you can get the minute in proper form, make the return of the money. It was pointed out in argument that difficulties might occur where some shareholder cannot be found, or where some shareholder is obstinate and will not take his money. If any such difficulty were to arise, it could always be met by paying the money to a separate account, or something of that kind; but until payment is in some way made I do not see how I can approve a minute which will proceed upon the footing that it has been made. There should be an affidavit that the money has been returned, and then I will approve the minute.

[*Younger, K.C.*, intimated that 2*s.* 6*d.* per share would be returned, and asked for the approval of the minute altered by omitting the last paragraph, commencing "Such reduction has been effected," and substituting "At the time of the registration of this minute the sum of 17*s.* 6*d.* has been and is to be deemed paid up upon each of the said shares."]

BUCKLEY, J.: Yes. Instead of stating how the reduction has been effected, the minute may state the result after it has been

effected. The affidavit may be produced to the Registrar of the Court, and the order, including the approval of the minute, will be postdated.

Solicitors : *Bischoff & Co.*

CURRIE v. CONSOLIDATED KENT COLLIERIES CORPORATION, LIMITED (IN LIQUIDATION).

1905, December 19. C. A. COLLINS, M.R., AND ROMER, L.J.

Company—Voluntary Winding-up—Action by Creditor—Stay of Action—Discretion of Court—Onus of Proof—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85, 87, 138—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 25—Companies (Winding-up) Rules, 1903, rr. 1, 92, 94, 107.

In an action by a creditor against a company in voluntary liquidation the plaintiff claimed a sum certain as an agreed fee for services rendered, and in the alternative claimed the like sum as on a *quantum meruit*. Upon an application for judgment under Ord. 14, the liquidator of the company disputed the plaintiff's claim. The liquidator obtained unconditional leave to defend, and an order was made giving directions as to pleadings, discovery, and trial of the action. The liquidator subsequently applied that all further proceedings in the action should be stayed upon the ground that the company was being wound up voluntarily :—

Held (affirming the order of PHILLIMORE, J., at Chambers), that the application must be refused.

Per COLLINS, M.R. : Where, in an action by a creditor against a company in voluntary liquidation, the creditor's claim is disputed by the liquidator, the presumption is in favour of the action being allowed to proceed.

APPEAL from an order of PHILLIMORE, J., at Chambers, affirming an order of the Master refusing to stay proceedings in the action.

The action was brought to recover from the defendants (a company in voluntary liquidation) a sum of 1,000*l.* alleged to be an agreed fee for services rendered by the plaintiff to the defendants, at their request, in connection with the affairs and reorganisation of the company.

Upon an application by the plaintiff for leave to sign final judgment under Ord. 14, the Master in Chambers, upon reading the affidavit of the liquidator, who disputed the debt, gave the defendants unconditional leave to defend and made an order giving directions as to pleadings, discovery, and trial of the action.

The plaintiff subsequently amended his claim by making an alternative claim for the sum of 1,000*l.* as on a *quantum meruit*.

The liquidator then applied by summons to the Master at Chambers for further directions that all further proceedings in the action be stayed, on the ground that the defendant company was being wound up voluntarily.

The Master having refused to order that all further proceedings in the action be stayed, PHILLIMORE, J., upon appeal, affirmed the order of the Master, but without prejudice to any application for stay of execution after judgment. Leave to appeal was given.

The liquidator appealed.

Gore-Browne, K.C. (C. C. Scott with him), for the liquidator:

The action ought to be stayed, unless the plaintiff can show special circumstances which make it right that the action should proceed. Before the Companies Act, 1900, and the Companies (Winding-up) Rules, 1908, there was a difference as to the rights of a creditor in a compulsory and in a voluntary winding-up. In a compulsory winding-up no action by a creditor against the company can be proceeded with except with the leave of the Court: Companies Act, 1862, ss. 85 and 87. There was no express provision in the Companies Act, 1862, as to staying a creditor's action in the case of a voluntary winding-up, though it has been held that the Court has jurisdiction in a voluntary winding-up to stay a creditor's action: *In re Keynsham Co.* [1868] (1). The practice in such a case was for the liquidator in the voluntary liquidation to apply for a stay; and upon the creditor being admitted to prove, and the liquidator undertaking, in the event of his rejecting the proof, to apply to the Court under section 138 of the Companies Act, 1862, to determine whether his decision was right or wrong, the action was stayed. The reason for thus putting the liquidator upon terms was that in a voluntary winding-up a creditor had no power of applying to the Court under section 138, the right being, by the language of the section, confined to liquidators and contributories. But the law in this respect has now been altered by the Act of 1900 and the Rules of 1908. An application may now

(1) 33 Beav. 123; 8 L. T. 687; 9 Jur. (N.S.) 855, 11 W. R. 926.

be made in a voluntary winding-up under section 138 by any creditor of the company: Companies Act, 1900, s. 25, and Companies (Winding-up) Rules, 1908, rr. 1, 92, 94, and 107. Now all reason for any distinction in the practice as regards staying a creditor's action between the case of a voluntary and that of a compulsory winding-up is gone, and in all cases the convenient and simple course is that the action should be stayed and that the creditor should prove his claim in the winding-up, it being open to him, if dissatisfied with the determination of the liquidator upon his proof, to apply to the Court and get the liquidator's decision varied or reversed. The onus of showing special circumstances for allowing the action to proceed now lies upon the creditor as well in a voluntary as in a compulsory winding-up. Under the old practice (except in the special cases of a mortgagee's or debenture-holder's action to enforce his security, or where the creditor had a claim against a third person) the Court always stayed a creditor's action, provided the creditor had, either by virtue of section 138 of the Companies Act, 1862, or by terms imposed on the liquidator, a right of access to the Court to obtain its determination upon any question arising in the winding-up. Now that the creditor is given access to the Court directly under section 25 of the Act of 1900, his action ought to be stayed unless he can show special circumstances for being allowed to proceed. It is admitted that in the case of a voluntary winding-up there is no provision, similar to section 87 of the Companies Act, 1862, in the case of a compulsory winding-up, which expressly takes away the creditor's right of action; in the case of a voluntary winding-up the liquidator has to apply to the Court for a stay.

[COLLINS, M.R.: It is difficult to see why the Legislature should not have interfered with the creditor's right to sue in the case of a voluntary winding-up, if it was not intended that *prima facie* he should have the right.]

The practice was that the creditor was always restrained as a matter of course from suing unless there were special circumstances. There is all the more reason for following this practice now that the creditor is expressly given the right to apply to the Court himself under section 138.

Kerly (Buckmaster, K.C., with him) for the plaintiff:

Where the liquidator in a voluntary liquidation applies for the stay of a creditor's action, the practice is to require him to state whether he admits the debt. In the present case the plaintiff will not resist a stay of the action if the liquidator will admit the debt. But here the liquidator disputes the debt, and the appropriate and convenient way of determining the dispute is by the existing action. The dispute is now before the Court ready for immediate determination, but if the action be stayed the result will be that after the creditor has put in a proof, and the liquidator has rejected it, and a number of intermediate steps have been taken, the plaintiff will apply to the Court to disallow the liquidator's rejection of his proof and determine the question between them. Why should the creditor be driven to having the dispute determined by this indirect process, with the consequent waste of time and expense? Where the liquidator disputes the debt the practice and the proper course is to allow the action to proceed. [He cited *In re Poole Firebrick and Blue Clay Co.* (1878) (2), per JESSEL, M.R.]

It is suggested that the onus of proof is now shifted to the detriment of the creditor, in consequence of the boon conferred on him by section 25 of the Act of 1900.

[ROMER, L.J.: Once it is admitted that the Court has a discretion, I do not see why it is necessary to discuss the theoretical question as to the onus of proof.]

The plaintiff, being the *actor*, is entitled to determine how the dispute shall be decided.

Gore-Browne, K.C., in reply, cited Lindley on Companies (6th ed.), p. 907.

COLLINS, M.R.: I am of opinion that no case has been made out by the appellant for interfering with the decision of the Judge at Chambers. We begin the discussion with the fact that the liquidator asserts that the plaintiff in the action has no claim—that is to say, the plaintiff's claim is disputed; and in that state of things the learned counsel for the appellant, as it seems to me, seeks, so far

(2) L. R. 17 Eq. 268, 272; 43 L. J. Ch. 447; 22 W. R. 247.

as the stay of a creditor's action against a company in liquidation is concerned, to put the case of an action to enforce a claim against a company in a voluntary liquidation upon the same footing as an action to enforce a claim against a company in a compulsory liquidation. It seems to me that the Legislature has carefully abstained from doing this. In the case of a company being wound up compulsorily by order of the Court, the Companies Act, 1862, contains in section 87 an express provision that no action shall be proceeded with against the company except with the leave of the Court, whereas it is admitted that in the case of a company in voluntary liquidation there is no such provision, but the liquidator must apply to the Court for a stay; so that, as it seems to me, the onus of showing that for some reason or other the creditor should not be allowed to proceed with the action lies upon the liquidator. It seems to me, therefore, that the view of the Legislature was that in a voluntary liquidation the ordinary tribunal was *prima facie* the proper place for discussing and determining the creditor's claim. No doubt where substantially the creditor's claim is admitted it is not necessary in that case for the action by the creditor to proceed. But this does not apply in the present case, where there is a real dispute as to the existence of any liability on the part of the company. I therefore think that in the present case the order of Mr. Justice PHILLIMORE was right, and that the liquidator has not succeeded in showing that in cases like the present the burden of proof is shifted from the liquidator to the creditor. In my judgment the presumption is in favour of the creditor's right to maintain the action.

ROMER, L.J.: In my opinion the Court has in these cases undoubtedly a discretion, which this Court ought to exercise, even though the Court below did not do so. Is the present case one in which the action should be stayed and the matter sent to the Chancery Division for determination? In my opinion no advantage can result from doing so, but, on the contrary, much inconvenience, delay, and expense. The claim in the action is an ordinary common law claim. The plaintiff alleges that he was employed by the defendant company to render certain services, and that he is entitled to be paid for those services either the fee which he alleges

was agreed to be paid, or, in the alternative, a reasonable sum. The liquidator of the company, which is in voluntary liquidation, does not admit that the plaintiff is entitled to be paid anything at all. He says he disputes the whole of the plaintiff's claim. The whole matter is therefore at large. There are the questions whether there was any contract, and whether the agreed services were rendered; and if the plaintiff's claim has to be rested upon a *quantum meruit*, the amount which the plaintiff ought to be paid for his services will have to be proved. Witnesses, therefore, will necessarily have to be called and cross-examined. Under these circumstances it seems to me that to accede to the liquidator's application must at least have the effect of causing great delay. It is obvious that, after several preliminary proceedings and waste of time and money, there will eventually have to be tried in the Chancery Division exactly the same question as must be tried in this common law action in the ordinary way. It seems to me, therefore, that this is clearly a case in which the Court, in the exercise of its discretion, ought not to interfere to stay the action.

Appeal dismissed.

Solicitors : *Mayo, Elder & Co.*, for the Plaintiff.
Dale, Newman & Hood, for the Defendants.

McMILLAN v. LE ROI MINING CO.

1905, December 20. JOYCE, J.

*Company—Meeting of Shareholders—Voting—“Personally or by proxy”—Poll—
Voting Papers—Power of Chairman.*

The articles of association of a limited company provided that votes might be given either personally or by proxy, and that if a poll were demanded it should be taken in such a manner as the chairman of the meeting should direct. A poll being demanded, the chairman directed the poll to be taken by means of voting papers:—

Held, that taking the poll by voting papers was unauthorised and invalid.

MOTION on behalf of the plaintiff and all other shareholders of the defendant company, except the defendant directors, for an

injunction to restrain the company and the directors from acting upon any resolution purporting to be passed by the use of voting papers used as votes of the members signing the same on a poll demanded at a general meeting of the company.

The meeting in question was held on 8 December, 1905, to consider an amalgamation scheme, and certain resolutions were put and carried or lost by a show of hands. The chairman then demanded a poll and directed that the manner of taking the poll should be by polling papers signed by the members, that the place should be the office of the company where the polling papers were to be delivered, and that the time should be at any time before noon on 22 December, 1905.

By clause 87 of the articles of association it was provided that "if a poll is demanded as aforesaid it shall be taken in such manner and at such time and place as the chairman of the meeting directs."

Article 94 provided that "votes may be given either personally or by proxy. The instrument appointing a proxy shall be in writing under the hand of the appointor or his attorney."

The voting paper was to be signed by the shareholder, and his vote on the resolutions therein set out was to be recorded by striking out the word "for" or "against." In a circular which was sent with the voting paper, it was stated that the voting paper would only be effective if signed and returned to the office of the company by a certain date, and that a vote by means of this voting paper would supersede any proxy already given.

Younger, K.C., and A. R. Kirby, for the motion :

Voting by means of a voting paper is not voting either personally or by proxy within the meaning of the articles. Nor is voting by voting papers a mode of voting known to the common law, and therefore the voting papers are inadmissible: *Reg. v. Wimbledon Local Board* [1882] (1) and *In re Horbury Bridge Coal, Iron, and Waggon Co.* [1879] (2). The chairman had no power to direct the poll to be taken by voting papers.

(1) 8 Q. B. D. 459; 51 L. J. Q. B. 219; 46 L. T. 47; 30 W. R. 400; 46 J. P. 292.

(2) 11 Ch. D. 109; 48 L. J. Ch. 341; 43 L. T. 353; 27 W. R. 433.

Gore-Browne, K.C., and *Cozens-Hardy*, for the defendants:

The mode of taking the poll by voting papers is a convenient method of taking the views of the shareholders, and is justified by the articles. The articles provide that the chairman may direct the manner in which the poll is to be taken, and therefore it is competent for him to direct it to be taken by voting papers.

Younger, K.C., was not called upon to reply.

JOYCE, J.: This case may not be entirely free from difficulty, but personally I do not think there is much doubt about it. It appears to me that *prima facie* a shareholder, in order to vote, must attend and personally give his vote unless he is voting under some statute or some regulation which entitles him to vote in a different manner. In the present case it is perfectly plain to my mind, looking at the articles, that a shareholder must vote either in person or by proxy—that is, through the agency of another shareholder (and it is limited to shareholders), who must be present if the shareholder himself be not present. Voting papers are not contemplated by these articles, and it seems to me that voting by means of voting papers would be at variance with different expressions which occur in the articles. It has been urged upon me that the chairman may direct the manner in which the poll is to be taken, but that does not entitle him to enlarge the power of voting. The chairman cannot by giving directions alter the rule as to the personal attendance of the voter or his proxy. In my opinion, what the defendants are proposing to do in this case is inconsistent with the regulations of the company, and therefore it is irregular and invalid. The Court, being of opinion that the mode of taking the poll by voting papers is unauthorised and invalid, restrain the defendants from acting upon the result of any poll so taken.

Solicitors: *Ashurst, Morris, Crisp & Co.*, for the Plaintiffs.

Burn & Berridge, for the Defendants.

IN RE 9, BOMORE ROAD.

1906, January 18. WARRINGTON, J.

Company—Sale of Assets—Leaseholds—No Assignment—Dissolution of Company—“No Existing Trustee”—Appointment of New Trustee—Vesting Order—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25, 26.

A company registered under the Companies Act, 1862, went into voluntary liquidation early in 1896, with a view to reconstruction, and the liquidators entered into an agreement for the sale of the property of the company, which included certain leasehold premises, to a new company. Shortly afterwards the new company was let into possession of the leasehold premises and had ever since been in possession thereof, but no formal assignment of the same was executed, and in October, 1896, the old company became dissolved by virtue of section 143 of the Act of 1862. The new company presented a petition for a declaration that the old company was at and immediately before its dissolution possessed of the leasehold premises as trustee for the petitioner within the meaning of the Trustee Act, 1893, and for the appointment, pursuant to section 25 of the same Act, of a named person as trustee of the premises in place of the old company, and for a vesting order pursuant to section 26 of the same Act. The Court made the appointment of the new trustee and the vesting order asked for by the petition.

Hanover (King) v. Bank of England (1), *In re Trusts of Land at Farnborough* (2), and *In re General Accident Assurance Corporation, Limited* (3), applied.

In re Taylor's Agreement Trusts (4) distinguished.

The words of section 25 of the Trustee Act, 1893, “although there is no existing trustee,” do not limit the powers given to the Court by that section or make it incumbent upon persons who apply to the Court to exercise its powers to show that there is no existing trustee.

By an indenture of lease dated 25 July, 1873, and made between Joseph Job Martin of the one part, and James Akhurst and George Norrish of the other part, a dwelling-house and premises known as

- (1) L. R. 8 Eq. 350; 21 L. T. 106.
- (2) Unreported. Reg. Lib. A. 1880-2297; MALINS, V.-C. November 19, 1880.
In re TRUSTS OF LAND AT FARNBOROUGH; and
In re THE TRUSTEE ACT, 1850, AND TRUSTEE ACT, 1852.

PETITION of Knell.

Court appointed John Matthew Chamberlain of, &c., trustee of the two several pieces of land situate, &c., in place of the Farnborough, &c. Society, Limited.

And orders that the said lands do vest in the said J. M. Chamberlain for all the estate which upon the execution of the said indenture of 12 July, 1874, remained vested in the Farnborough, &c. Society, Limited, upon trust for the petitioner, his heirs and assigns.

- (3) [1904] 1 Ch. 147; 73 L. J. Ch. 84; 89 L. T. 699; 52 W. R. 332.
- (4) [1904] 2 Ch. 737; 73 L. J. Ch. 557; 52 W. R. 602.

9, Bomore Road, in the parish of St. Mary Abbott's, Kensington, were demised unto J. Akhurst and G. Norrish, their executors, administrators, and assigns, from 24 June, 1878, for the term of ninety-nine years, at the rent and subject to the covenants by the lessees and the conditions by and in the indenture of lease reserved and contained.

J. Akhurst died on 20 October, 1881.

By an indenture dated 9 September, 1890, and made between G. Norrish of the one part, and Pitt & Norrish, Limited, which was a company duly registered in 1890 under the Companies Act, 1862, the premises comprised in and demised by the indenture of lease were assigned to the company for all the then residue of the term, subject to the payment of the rent and the performance of the covenants and conditions aforesaid.

On 5 and 26 February, 1896, respectively, resolutions were duly passed and confirmed for the reconstruction of Pitt & Norrish, Limited, and for the winding up voluntarily of the company, and Frederick Gordon and George Norrish, the liquidators thereby appointed, were authorised to consent to the registration of a new company, to be named Pitt & Norrish, Limited, and to enter into the agreement hereinafter set out with the new company when incorporated.

By the agreement dated 26 February, 1896, and made between the old company and its liquidators of the one part, and the new company of the other part, it was agreed that the old company and its liquidators should transfer, and the new company should take over as from 1 January, 1896, all and singular the lands, buildings, and other the property of the old company therein described, and that as part of the consideration for the transfer the new company should assume, undertake, pay, satisfy, and discharge all the debts, liabilities, and obligations of the old company, and perform and fulfil all contracts and engagements then binding on it, and pay all costs and expenses of and incidental to the winding-up of the old company and carrying the transfer into effect.

The new company were shortly after the execution of the agreement let into possession of the leasehold premises demised by the indenture of lease of 25 July, 1878, and had ever since been in possession thereof, but no assignment to the new company of the lease or the term of years thereby created had been executed.

On 9 July, 1896, a general meeting of the old company was duly held pursuant to section 142 of the Companies Act, 1862, and on 15 July, 1896, the liquidators duly made the return required by section 143 of the same Act, and by reason thereof the old company became dissolved on 15 October, 1896.

In November, 1905, the new company were desirous of dealing with the leasehold premises, and had entered into a contract for sale of the same, when it was discovered that the premises had not been formally assigned to them. The new company thereupon presented this petition, which was intituled "In the matter of the trusts affecting hereditaments known as No. 9, Bomore Road, . . . arising under a contract for sale dated the 26th of February, 1896, and made between Pitt & Norrish, Limited (since dissolved), and Frederick Gordon and George Norrish, of the one part, and Pitt & Norrish, Limited, of the other part, and in the matter of the Trustee Act, 1893."

The petition asked, first, for a declaration "that the old company was at and immediately before the date of its dissolution possessed of the then residue of the said term in the said leasehold premises as trustees for the petitioners upon a trust within the meaning of the Trustee Act, 1893"; secondly, "that, pursuant to section 25 of the same Act," a certain named person "may be appointed to be a trustee of the said premises in the place of the old company, and that the said premises may, pursuant to section 26 of the same Act, be ordered to vest in" the said person "for all the residue of the said term or other the estate or interest therein vested in the old company immediately before the dissolution upon the trusts upon which the same were held by the old company as aforesaid."

The petition was not served upon any person.

J. G. Wood, for the petitioners:

The recent authorities on the question of the power of the Court to appoint a new trustee and to make a vesting order under circumstances similar to those in this case are conflicting. In *Hanover (King) v. Bank of England* [1869] (1) new trustees were appointed of a sum of Consolidated Bank Annuities standing in the name of an incorporated body that had ceased to exist, and they were directed to transfer the same to the persons entitled. In the case of *In re Trusts*

of Land at Farnborough [1880] (2), which was on all-fours with the present case except that the land in question there was freehold, MALINS, V.-C., appointed a new trustee and made a vesting order.

FARWELL, J., in *In re General Accident Assurance Corporation, Limited* [1908] (3), made an order under sections 26 and 35 of the Trustee Act, 1893, vesting in new trustees a mortgage of leaseholds which had been vested in a company that had ceased to exist. In *In re Taylor's Agreement Trusts* [1904] (4), a case in which letters patent were vested in a deceased patentee, BUCKLEY, J., declined to follow FARWELL, J.'s decision. But in the later case of *In re Richard Mills & Co., Limited, Smith v. The Company* [1905] (5), which again was a case under section 26, FARWELL, J., notwithstanding *In re Taylor's Agreement Trusts* (4), followed his own earlier decision. Section 25 of the Trustee Act, 1893, under which the present application is made, is in very general terms, and confers ample jurisdiction on the Court to make the appointment and vesting declaration now asked for.

WARRINGTON, J., after stating shortly the facts, continued : Now the difficulty that arises is in consequence of some conflict of authority. In the first place there is the case of *Hanover (King) v. Bank of England* (1). In that case a large sum of Consols stood in the name of the Lords of his Majesty's Royal Regency of Hanover, and it appeared that on the taking over of the kingdom of Hanover by Prussia the body described in the report of the case as the corporation or quasi-corporation known as the Lords of his Majesty's Royal Regency of Hanover ceased to exist, and it became necessary, as in this case, to do something to make a title to those Consols, and ultimately Vice-Chancellor JAMES made an order under the section of the old Trustee Act corresponding to section 25 of the Trustee Act, 1893, which order is set out in the report. It was, so far as material, in these terms : It declared that the body or persons described in the bank-books as the Lords of his Majesty's Royal Regency of Hanover were trustees of the 600,000*l.* Bank Annuities mentioned in the pleadings for the persons entitled thereto under the family letter of 19 November, 1836, in the bill mentioned ; "and it appearing that it is expedient to appoint new trustees of the said sum of Bank Annuities, and that

(5) W. N. (1905) 36 ; 40 L. J. N. C. 177.

such appointment cannot be made except by the order of this Court," trustees were appointed, and a vesting order was made.

The next case is an unreported case, *In re Trusts of Land at Farnborough* (2), the note of which in the Record Office counsel has been kind enough to give me, in which an order was made by Vice-Chancellor MALINS. That was a case relating to real estate, and the facts were for all practical purposes identical with the present. The estate had been vested in a company; the company was dissolved, and Vice-Chancellor MALINS made an order appointing a new trustee, as I am asked to do in this case, and on that appointment making a vesting order in that new trustee. Then later on, in the year 1903, Mr. Justice FARWELL, in a case of *In re General Accident Assurance Co., Limited* (3), had to deal with a case exactly on all-fours with that with which I have now to deal, in which a mortgage of leaseholds had been vested in a dissolved company, and it was necessary to vest that mortgage in a purchaser from the dissolved company. In that case Mr. Justice FARWELL was not asked to appoint new trustees; he was asked to act under sections 26 and 35 of the new Trustee Act, and to make a vesting order as on the footing that the premises had been vested in a trustee who could not be found. He thought it right to make the order. In a subsequent case of *In re Richard Mills & Co., Limited, Smith v. The Company* (5), Mr. Justice FARWELL made a similar order under section 26 of the Act of 1893.

So far the authorities seem to authorise me to do what I am prepared to do, and I should have no hesitation at all except for the decision of Mr. Justice BUCKLEY in *In re Taylor's Agreement Trusts* (4). I think I need say very little about that case, because the subject-matter was a different subject-matter from that with which I have to deal. He was dealing there with a patent, and I think his decision is determined largely by the fact that he was dealing with letters patent granted by the Crown to a patentee who had ceased to exist, and consequently the letters patent might be said to have merged and to have disappeared altogether. He did deal in a few words with section 25, on which I am asked to act; but I think in his dealing with that section his judgment was directed, as was natural, mainly to the fact with which he had to deal—namely, that the subject-matter in the case before him was letters patent. Turning

to section 25 of the Trustee Act, 1898, the form of order mentioned in that section is in perfectly general terms. It empowers the Court, whenever it is expedient, to appoint a new trustee, and if it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, to make an order for the appointment of a new trustee or new trustees. Now, is it expedient in this case to appoint a new trustee? There can be no doubt about that. Here is a property vested in a purchaser in equity, with a legal estate outstanding; nobody knows where that legal estate is, and except by appointing a new trustee it is impossible to get that estate vested where it ought to be—namely, in the purchaser or a nominee of the purchaser. That being so, the section enables the Court to do that which it is expedient to do where it cannot, as in the present case, be done without the assistance of the Court. Then it merely adds these words, "although there is no existing trustee," words not limiting in any way the powers given to the Court by the previous part of the section, or making it incumbent upon persons who apply to the Court to exercise its power to show that there is no existing trustee. The words merely prevent any limitation of the general power in the earlier part of the section in a case in which it is shown that there is no existing trustee. I think, therefore, that I am justified in making an order, whether there is an existing trustee or not. I propose to make an order in the form asked for by the petition.

Solicitors: *Edell & Gordon.*

IN RE BRITISH POWER, TRACTION, AND LIGHTING
CO., HALIFAX JOINT-STOCK BANKING CO. v.
THE COMPANY.

1906, January 24, 25, 26; February 6. WARRINGTON, J.

Company—Winding-up—Debenture-holders' Action—Appointment of Receiver and Manager—Order authorising Money to be raised to a Limited Amount—General Purposes of Carrying on Business—Debts and Liabilities in Excess of Limit—Right to Indemnity.

Where a receiver and manager appointed in a debenture-holders' action is authorised by the Court to raise by mortgage of the company's assets a sum not exceeding a certain limit for the general purposes of carrying on the business, it is his duty, if he finds the limited sum insufficient, to apply to the Court to increase it or give leave to incur further expenses or liabilities. If he incurs such expenses or liabilities without applying to the Court he is not entitled to be indemnified unless he can show that, having regard to all the circumstances, he was justified in incurring them without leave.

Sembly, it is not sufficient justification merely to show that the expenses and liabilities were incurred *bona fide* and in the ordinary course of business.

COURT summons raising the question whether a manager appointed in an ordinary debenture-holders' action is entitled to be indemnified out of the assets of the company in respect of the debts and liabilities incurred by him in carrying on the business of the company where an order has been made authorising him to raise money by mortgage of the assets of the company to a certain limited amount for the general purposes of carrying on the business, and he has incurred debts and liabilities beyond the limit.

The facts were stated by WARRINGTON, J., as follows:

"The applicants in this case ask for a declaration that the late manager appointed by the Court in the action (an ordinary debenture-holders' action) is not entitled to be indemnified out of the assets of the company in respect of certain debts and liabilities incurred by him in carrying on the business of the company. On the answer to this question it depends whether creditors of the manager in respect of such debts and liabilities are to be paid out of the assets of the company, the manager himself having become bankrupt. The summons asks, in the alternative, that the respective priorities of the debenture-holders and the several classes of creditors may be determined.

"By an order in the action dated 27 August, 1902, Herbert Watkins was appointed receiver of the undertaking and property of the defendant company and to manage its business, but he was not to act as such manager after 30 December, 1902, without the leave of the Judge.

"By an order of 28 August, 1902, it was ordered that, for the purpose of paying the current week's wages and the amount due for gas, as mentioned in an affidavit of Mr. Hodgson therein referred to, the manager was to be at liberty to raise on mortgage of the assets of the defendant company a sum not exceeding 750*l.* at interest at a rate not exceeding 5*l.* per cent. per annum, and that such money when raised, and interest, was to be a first charge upon the assets of the defendant company, and all the property and effects included in the debentures. By a further order dated 4 September, 1902, it was ordered that the manager was to be at liberty to raise on mortgage of the assets of the defendant company such a sum as, with the sum of 750*l.* in the order of 28 August, 1902, referred to, would not exceed 3,000*l.*, with interest at a rate not exceeding 5*l.* per cent. per annum, and it was ordered that such money when raised, and interest, was to be a first charge upon the assets of the defendant company and all property and effects included in the debentures. This order, as well as that of 28 August, was made upon the affidavit of Mr. Hodgson ; and from that it appears clearly that, except the 750*l.* mentioned in the order of 28 August, the money was required for the ordinary current expenses of carrying on the business of the company.

"On 4 September, 1902, a petition for winding up the company was presented, upon which a winding-up order was made on 16 December. Meanwhile judgment was obtained in the action on 29 November.

"On 15 December leave was given to the manager to carry on the business till 18 January, 1903, and on 14 January, 1903, further liberty to carry on the business for a period of three months was given. Each of the applications on which leave was so given was supported by an affidavit of the manager. No application was on either of these occasions, or at any other time, made for leave to borrow any further sum or to incur any further liability.

"On 11 February, 1903, an order was made by which, after stating that Herbert Watkins desired to retire from his office of receiver and manager, and he consenting to the order, one George Pepler Norton was appointed receiver and manager, and it was ordered that he should forthwith, out of any assets coming to his hands other than money borrowed by him for payment of wages as thereafter authorised, pay the debts, if any, of the company which might have priority over the claims of the debenture-holders, and make provision for paying the liabilities properly incurred by the said H. Watkins as receiver and manager. By the same order Watkins undertook within ten days to lodge his first and final account. The order contained other directions not material for the purposes of this judgment.

"On 18 February, 1903, Watkins left the country and took with him 465*l.*, the moneys of the company, insisting that he was entitled to retain that sum for his indemnity.

"Watkins did not lodge his account as directed by the order of 11 February, and on 2 March, 1903, the Registrar directed the new receiver to make out such an account of the receipts and payments of Watkins as he could.

"By an order of 10 March, 1903, it was ordered that the new receiver and manager should be at liberty to raise on mortgage of the assets of the defendant company such sum or sums, not exceeding in all 1,000*l.*, as he might think necessary, with interest as therein mentioned, and that such moneys when advanced, with interest, should be a charge on the assets of the defendant company ranking immediately after any moneys, not exceeding in all 3,000*l.*, borrowed by the said Herbert Watkins pursuant to the leave given to him by the orders of 28 August, 1902, and 4 September, 1902; but, subject to the direction as to the priority of the sum or sums thereby authorised to be borrowed thereinbefore contained, the order was to be without prejudice to any right of Barclay & Co., Limited, to obtain repayment out of the assets of the defendant company in priority to the debenture-holders of any sum in excess of the said sum of 3,000*l.* which they might have lent to the said Herbert Watkins as receiver and manager. Barclay & Co. were the bankers of the former manager, and he had borrowed from them the 3,000*l.* authorised by the order of 4 September by means of an

overdraft. He had overdrawn his account to the extent of 1,500*l.* in addition. It is this excess in the overdraft to which the order refers.

"On 5 May, 1903, the account of the receipts and payments of Watkins, as prepared by Norton under the directions given on 2 March, was filed, whereby it appeared that the total overdraft was 4,500*l.*, and that there were, in addition, outstanding debts to a considerable amount. Subsequently directions were given for the winding-up of the business and a sale of the assets. These are now represented by a sum of about 8,700*l.* Consols and a sum of about 50*l.* cash in Court.

"By an order dated 19 July, 1904, two inquiries were directed: first, what creditors there are in respect of debts and liabilities incurred by Watkins as receiver and manager, and what are the amounts due to such creditors respectively; and secondly, whether the said Herbert Watkins, as such receiver and manager, is entitled to be indemnified out of the assets of the defendant company in respect of the said debts and liabilities, or any of them, and, if so, to what extent.

"By an order of 26 July, 1904, it was declared that Barclay & Co. were entitled in priority to all the holders of debentures issued by the defendant company to a charge on the assets of the defendant company for 8,000*l.*, with interest as therein mentioned, being the amount borrowed in pursuance of the orders of 28 August, 1902, and 4 September, 1902; but that order was to be without prejudice to any question as between Barclay & Co. and the creditors in the order mentioned whether the charge thereby declared was in priority to any right of indemnity out of such assets to which the said Herbert Watkins might be found to be entitled, and also to the rights, if any, of his creditors claiming the benefit of any such indemnity, and also without prejudice to the rights, if any, of Barclay & Co. to claim the benefit of such indemnity as one of such creditors. Under the inquiry directed by the order of 19 July, 1904, claims have been carried in for sums amounting to upwards of 6,000*l.* in addition to the authorised sum of 8,000*l.* Watkins has returned to this country, and has been adjudicated bankrupt.

"It has been thought convenient that the Court should settle the

principle upon which the alleged right of Watkins to an indemnity and the consequent right of his creditors to be paid out of the assets of the company should be determined before the Registrar proceeds to consider the details of the several claims. The present summons has accordingly been issued."

Norton, K.C., and *P. F. Wheeler*, for the plaintiff debenture-holders :

When a receiver and manager has obtained an order giving him liberty to raise money not exceeding a certain sum, he cannot claim indemnity for debts he incurs in excess of that sum. That is so, at least, if he is authorised to borrow the limited sum for the general purposes of carrying on the business. The matter is covered by what CHITTY, J., says in *Taylor v. Neate* [1888] (1). That case was approved in *Burt v. Bull* [1894] (2). There is no object in giving a manager leave to borrow to a limited amount, if he may borrow beyond the limit without leave. He knows, when he is told the limit of his borrowing powers, what is the extent of his indemnity. *Strapp v. Bull, Sons & Co.* [1895] (3) was the case of a direction to receivers and managers to complete specific contracts—a different thing from the present case—and the subsidiary contracts which they entered into were necessary in order to complete the original contract which they were ordered to carry out, and the only point was whether they were entitled to priority over the money which they borrowed; and it was held they were, because the persons who had advanced it were outside the category of strangers, and had become co-adventurers with the debenture-holders. But that is the only case in which a receiver has been allowed an indemnity beyond the amount limited. There is no other authority on the point either way. But the plaintiffs contend that, as a matter of law, no matter how proper the excess borrowing may be, a receiver may not borrow beyond his limit.

There are, upon the evidence, circumstances in the present case

(1) 39 Ch. D. 538; 57 L. J. Ch. 1044; 60 L. T. 179; 37 W. R. 190.

(2) 2 Manson, 94; [1895] 1 Q. B. 276; 64 L. J. Q. B. 232; 71 L. T. 810; 43 W. R. 180; 14 R. 65.

(3) 2 Manson, 441; [1895] 2 Ch. 1; 64 L. J. Q. B. 658; 72 L. T. 514; 43 W. R. 641; 12 R. 387.

which should prevent this particular receiver from being entitled to an indemnity, even if an ordinary receiver exceeding his limit would be. He knew he was in difficulty, but did not keep the debenture-holders informed of his position; and, when he did tell them that he was running into debt, he said it was merely temporarily. He was invited to apply to the Court for further leave; but he declined to do so. He said he was paying cash for everything, which was not the fact, and he never kept proper accounts. Under these circumstances, he is not entitled to the indemnity.

Buckmaster, K.C., and Frank Russell, for Barclay's Bank:

These defendants agree with the plaintiffs that Watkins's claim for indemnity has priority, as to 8,000*l.*, over the debenture-holders, and they claim the same as to the additional 1,500*l.* also. So far as the plaintiffs' argument goes to displace the claims of the other defendant creditors, these defendants crave leave to adopt it.

Upjohn, K.C., and J. R. Atkin, for creditors claiming damages for breach of warranty of goods sold:

This is a case of the utmost importance, which concerns a vast number of cases throughout the country, and will, if the plaintiffs' contention is right, deter chartered accountants from accepting the position of receiver and manager, and encourage debenture-holders to scrutinise and take advantage of every act, omission, or failure of a person in that position. When anyone is appointed to be a manager it is a term of his appointment that he is to carry on the business, and in so doing it is his duty to pledge his credit and enter into necessary and proper contracts. It is thus an implied term of his appointment that he is entitled to indemnity for pledging his credit. He is *ex necessitate rei* a principal, and as such is in the same position as a trustee or other person in a fiduciary position who carries on a business. That, unless an express term is imported into the contract, is his position. The creditors are not in a better position than Watkins. The limit of the amount he was authorised to borrow was not a limitation of his ability, but was intended to facilitate his position.

The matter cannot be better expressed than by RIGBY, L.J., in *Burt v. Bull* (2).

[WARRINGTON, J.: The only question in that case was whether the manager was personally liable.]

Two terms—namely, the duty to enter into contracts and the right to indemnity—are implied in the appointment of a receiver and manager, and the result of putting together *Burt v. Bull* (2) and *Taylor v. Neate* (1) is that the implied term may be excluded by express provision. If a principal wishes to limit his agent's authority he must make the limitation clear and unambiguous. The order in *Taylor v. Neate* (1) was not the usual one, which is in general terms, but was in the form of a negative. Moreover, the subject-matter in the present case is different from that in *Taylor v. Neate* (1). *Strapp v. Bull, Sons & Co.* (3) entirely covers the point. A limitation beyond the limit was not imposed by the order upon Watkins's authority to incur expenses, and if the exercise of his discretion in incurring the further expenses and liabilities was sound he will be allowed his indemnity. There is no connection between the order limiting the amount to be raised and his general power to pledge his credit, but the two exist side by side.

As to his having forfeited his right to indemnity by his conduct, the right to indemnity is independent of discretion, and is one of contract, and can only be got rid of by fraud on his part or conduct amounting to repudiation of the contract, such repudiation being accepted by the other party : *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* [1884] (4). But it cannot be suggested that the present case comes anywhere near to that. The complaint is not that Watkins repudiated his post, but that he stuck to it too long. It is said that he took the steps he did without giving information of his position. If the Court holds that argument to be right, it will be the first time it has been held that a manager has a duty to keep anyone informed as to the course of management. His duty is only to the Court. The whole time he was acting he was under the order of the Court, so at no time can it be

(4) 9 App. Cas. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.

said that he was acting improperly, without authority. There was full and frank disclosure of all that Watkins regarded as material on the applications to the Master and the Registrar.

Cave, K.C., and H. Lindon Riley, for creditors in respect of goods ordered by Watkins and subsequently refused by the new manager :

These defendants crave leave to adopt the preceding argument. If a receiver and manager is not to borrow according to his ordinary powers, the Court should say so and put it in the order, as in *Taylor v. Neate* (1).

[They also referred to *In re Bushell, Ex parte Izard* [1888] (5), *Batten v. Wedgwood Coal and Iron Co.* [1884] (6), and *In re Glasdir Copper Mines, Limited, English Electro-Metallurgical Co. v. Glasdir Copper Mines, Limited* [1905] (7).]

Norton, K.C., in reply :

The plaintiffs agree that the receiver is to be indemnified out of the assets for all he properly does and incurs. The question is whether, he being limited to 3,000*l.*, the extra borrowing was properly incurred. It may be that the onus of proof is merely shifted. Expenses for the salvage of the property would be properly incurred. Limiting a receiver's power of borrowing and saying he must not enter into contracts are the same thing. The limit of borrowing is for the purpose of preventing his entering into contracts. There is no hardship on a receiver in having to come to the Court if he wants more.

[*Leedham v. Chawner* [1858] (8) and *In re Dunn, Brinklow v. Singleton* [1904] (9), were also referred to.]

Cur. adv. vult.

February 6.

WARRINGTON, J., read a written judgment, in which, after stating the facts as set out above, he proceeded as follows: The

(5) 23 Ch. D. 75; 52 L. J. Ch. 678; 48 L. T. 751; 31 W. R. 418.

(6) 28 Ch. D. 317; 54 L. J. Ch. 686; 62 L. T. 881; 38 W. R. 603.

(7) *Ante*, p. 41; [1906] 1 Ch. 365; 75 L. J. Ch. 109; 94 L. J. 8; 22 T. L. R. 100.

(8) 4 K. & J. 458.

(9) [1904] 1 Ch. 648; 73 L. J. Ch. 425; 91 L. T. 135; 52 W. R. 345.

law as to the position of a manager appointed by the Court, where no special provision is made for meeting expenses and liabilities incurred by him, is not disputed, and is, indeed, beyond dispute. It is, on the one hand, his duty to carry on the business, and for that purpose to enter into proper contracts on his own responsibility, and it is, on the other hand, his right to be indemnified out of the assets against expenses and liabilities properly incurred in the execution of his duty : *Burt v. Bull* (2) and *Strapp v. Bull, Sons & Co.* (3). Moreover, though I do not find this anywhere expressly laid down, I think that expenses and liabilities *bona fide* incurred in the ordinary course of the business would *prima facie* be treated as having been properly incurred. But is the position of the manager the same in cases where, as here, he is authorised to borrow a sum not exceeding a certain limit for the general purposes of the business he is carrying on ? I say advisedly "for the general purposes," for what I am about to say is not intended to apply to cases where the authority to borrow is for some special purpose. The effect of an authority to borrow for general purposes is to provide at the expense of the parties interested in the assets a special fund out of which the manager can indemnify himself, and the amount of that fund is fixed after considering what the parties interested state as to the requirements of the business. What is the result as to the manager's general right to indemnity ? That he is not deprived of it altogether follows, in my opinion, from the decisions in *Strapp v. Bull, Sons & Co.* (3), above referred to, and *In re Glasdir Copper Mines* (7). On the other hand, when the Court thus protects the manager by providing a special indemnity, it cannot be that he is nevertheless entitled, without any further authority, to incur expenses and liabilities to an unlimited extent and to require them to be met out of the assets. It seems to me the true position in these cases is that the order is intended to limit his general authority, and, if he finds that the fund provided by the Court is not sufficient, it is his duty to cause the matter to be brought before the Court, so that, if it sees fit, it may increase it, or give him leave to incur further expenses or liabilities, which comes to the same thing. If, without such an application being made, he incurs expenses and liabilities exceeding the limit, he is, in my opinion, not entitled to

be indemnified against them unless he can show that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave. If he succeeds in showing this, then I think the expenses and liabilities would be properly incurred, but not otherwise. What circumstances would justify the conduct of the manager in so incurring such expenses and liabilities without leave cannot, I think, be defined in general terms, but must be determined in each particular case. I will only say that, in my opinion, it would not be enough to show that the expenses or liabilities were incurred *bona fide* and in the ordinary course of business. As regards authorities, there is, in my opinion, none which throws any light upon the case. It is true that in *Strapp v. Bull, Sons & Co.* (3) and *In re Glasdir Copper Mines* (7) managers with special powers to borrow were treated as entitled to an indemnity for expenses outside the limit; but in neither case was the present question raised, and I cannot but assume that the parties there did not desire to question the propriety of the manager's conduct in incurring such expense.

It was argued that the rights and duties of the manager were fixed once for all by the original order. I cannot take this view. It seems to me that the Court can at any time limit the authority of its own officer. The result is that it is still open to the manager, and through him to the claimants, to show that his liabilities to the latter were properly incurred so as to entitle him to an indemnity, and them to payment through him. I was, indeed, asked to say that, under circumstances which were put in evidence, the manager in this particular case was entitled to no indemnity at all. I cannot come to this conclusion; and I think it better not to discuss the evidence, inasmuch as it will have to be gone into on the examination of the several claims before the Registrar, and I am anxious not to prejudice questions the complete materials for deciding which may not be before me. I propose to declare that Herbert Watkins, the late receiver and manager, is entitled to be indemnified against those debts and liabilities only (over and above the permitted overdraft of 8,000*l.*) as to which he shall satisfy the Judge that, having regard to all the circumstances under which the same respectively were incurred, he was justified in incurring them without first obtaining the leave of the Judge. That part of the summons which

84 IN RE BRITISH POWER, TRACTION, &c., CO. [MANSON,

refers to the priorities of the several classes of creditors had better stand over until the Registrar has dealt with the several claims having regard to the above declaration.

Solicitors : *Jaques & Co.*, agents for *Dickons & Aked*, Halifax, for Plaintiffs.

Howe & Rake, agents for *Lucas, Hutchinson & Meek*, Darlington, for Barclay's Bank.

Herbert Smith, Goss, King & Gregory, for Creditors.

Tippetts, agent for *J. W. Wall*, Bootle, for other Creditors.

HOOPER v. HERTS.

1906, February 18, 14. C. A. COLLINS, M.R., ROMER AND COZENS-HARDY, L.JJ.

Company—Shares—Mortgage—Agent—Blank Transfer—Estoppel—Notice to Company not to Register—Right to Sue—Damages for Delay Occasioned—Measure of.

A person who executes a transfer of shares thereby comes under an implied obligation not to hinder the transferee from obtaining registration, and this applies to a case where the transfer is originally made in blank by the transferor and subsequently filled in by a *bond fide* holder for value, in whose favour it is binding by estoppel against the transferor.

Dictum of Lord ESHREB, M.R., in London Founders' Association v. Clarke (1), followed and applied.

The measure of damages for the breach of such obligation is the difference between the value of the shares at the time when in the ordinary course they would but for the delay caused by the transferor have been registered in the name of the transferee and their value at the time when the transferee's right to registration is established, in estimating which all the material circumstances affecting the selling value of the shares must be taken into account.

W. executed a blank transfer of shares, and placed it, together with the share certificate, in the hands of H. for the purpose of raising money under circumstances which the Court held to estop W. from denying that he had given to H. the necessary authority. H. applied to the plaintiff, who made a small advance out of his own money (which was afterwards repaid), and also at H.'s request borrowed 700*l.*, for H.'s use, from a bank, on the deposit of the blank transfer and share certificate and on the plaintiff's personal security, H. undertaking to indemnify the plaintiff and to repay to him the 700*l.* The loan not having been repaid, the bank, with a view to realise the security, filled up the blank transfer with the plaintiff's name as transferee, and sent it to the company for registration. W. thereupon gave notice that he disputed the validity of the transfer, thus preventing the plaintiff from dealing with the shares, which had since fallen in value. The plaintiff brought this action, claiming damages against W. Since the commencement of the action the plaintiff had repaid the 700*l.* to the bank:—

Held, that W., in preventing the registration of the plaintiff's name as transferee, had committed a breach of his implied obligation arising out of the transfer, and that the plaintiff was in a position to claim damages for that breach.

APPEAL from KEKEWICH, J.

Whatton gave to Herts a blank transfer of 1,467 fully paid shares in a limited company, executed by Whatton, together with the

(1) 20 Q. B. D. 576, 582; 57 L. J. Q. B. 291, 293; 59 L. T. 93; 36 W. R. 489.

share certificate, for the purpose of raising money on the shares for Herts' own purposes, though Whatton alleged that Herts' authority was subject to certain restrictions, which he had exceeded. Herts applied to the plaintiff, with whom he had had previous dealings, and obtained from him a small advance on the deposit of the blank transfer and certificate. This advance, together with some other moneys owing by Herts, was repaid to the plaintiff by Herts out of the 700*l.* advance presently mentioned. Herts having applied to the plaintiff for a further advance, the plaintiff informed him that he was unable to find the money himself, but would endeavour to borrow it from the Mines and Banking Corporation, who ultimately agreed to lend 700*l.* to the plaintiff on the security of the shares and also on the plaintiff's personal liability, the loan to be repaid within fifteen days; and on 14 January, 1904, Herts wrote a letter authorising the plaintiff to raise the money in that way, and also undertaking to indemnify the plaintiff against any loss arising from the transaction from any cause whatever, and agreeing, if necessary, to redeem the shares in two weeks' time. He also gave a written receipt to the plaintiff for the 700*l.* "advanced by the Mines Corporation on the shares on the understanding that the amount be repaid in fifteen days, or the shares may be transferred into the name of the corporation or their nominee, and in event of any sale of same being effected the difference between the amount obtained and the 700*l.*, with interest, if any, to be made good by me." The blank transfer and share certificate were deposited by the plaintiff with the Mines Corporation on the advance being made.

A letter from Whatton was also produced to the bank, which KEKEWICH, J., considered sufficient to lead the plaintiff and the bank to the conclusion that Herts might pledge the shares and give a receipt for the money.

Herts having made default in repayment of the 700*l.*, the Mines Corporation proceeded to realise the security, and filled in the plaintiff's name as the transferee (by whom it was executed), and applied to the company for registration. Notice of the application was sent in the usual way to Whatton by the company, and on 26 March, 1904, Whatton gave notice to the company that the transfer was not in order and ought not to be completed, the effect of which was to stop the registration. The shares at that date had some

value, which was entirely lost by the close of the year, and they were now practically worthless. The plaintiff had himself repaid the 700*l.* to the Mines Corporation after the commencement of this action. Whatton alleged that Herts had exceeded his authority, and that the transfer was not binding as against himself.

The plaintiff brought this action against Herts and Whatton on 30 April, 1904, claiming a declaration that he was entitled to a charge upon the shares, and consequential relief, and also (by amendment made 14 June, 1904) claiming "damages for the breach of the implied contract or obligation by Whatton not to do anything to prevent or delay the registration of a *bona fide* purchaser for value of the shares."

KKEKIEWICH, J., gave judgment in the plaintiff's favour as to the declaration of charge and consequential relief, holding that Herts had ample authority for what he did, or at any rate that Whatton could not be heard to say that he had not, and that the plaintiff had acted in good faith; but he dismissed the action so far as it claimed damages, on the ground that the plaintiff himself was in such a position that he could not prove that he had sustained any damage by virtue of the breach of his obligation by Whatton, since the plaintiff was not entitled to demand registration for his own benefit, but only for that of the Mines Corporation, who had suffered no loss. On this part of the case KKEKIEWICH, J., after stating that, owing to Whatton's warning to the company, no registration took place, and consequently the plaintiff could not deal with the shares, continued: "Now it is said that the result is that Whatton is liable in damages to Hooper. I have not the slightest doubt that if a man transfers shares to another and then stops that transfer he is liable in damages for any loss occasioned by the transfer not being registered or the transferee not being able to deal with the shares. What the damages are may be a difficult question, and must be considered of course with reference to the facts of each case. There is something, no doubt, in the argument that the price of the shares in the market makes the damages rather remote. That would have to be considered, but the plaintiff can maintain an action—whether for breach of contract or tort, and whether based on derogation from the grant or on implied obligation, I do not propose to consider—but I have not the slightest doubt that an action is maintainable. My difficulty

is that this action was brought by Hooper when Hooper himself, though he was the transferee of the shares, was not requesting the sale of the shares and could not at the time have sold them for his own benefit. The Mines Corporation could not by themselves have brought an action at that time, but I think that they could have brought an action in the name of Hooper either alone or jointly with themselves. But the Mines Corporation had not suffered any damage; and although the action would have been maintainable, I cannot see how they could have obtained a verdict. At that time the damages would not have been ascertained, because they had a remedy over against Hooper, their borrower. They certainly cannot obtain a verdict now, because they have been paid by Hooper. I cannot consider the action as now brought by the Mines Corporation. It is brought by Hooper. I must on the question of damages go back to 30 April, 1904, the date of the issue of the writ, and consider whether Hooper could maintain an action for damages at that date. He had not then paid off the Mines Corporation. He was only their trustee, and was not entitled to be subrogated to their rights until August, 1904, when he paid them off. If he had paid anything at the date of the issue of the writ it was certainly a small sum, and certainly he had no right then to be subrogated to their rights as against Whatton. He was not in a position to maintain the action, and he had suffered no damage at that date. If the action could have been tried at once it would have been said, 'You have no doubt a right to call for a transfer, but only as agent for the Mines Corporation; therefore you are only a nominal plaintiff'; and that would have been to my mind a great difficulty in the plaintiff's way. A still greater difficulty would have been that there was no damage to him—the damage was to the Mines Corporation. I recognise the hardship in this on Mr. Hooper, and though I ought not to say that I hope my reasoning is unsound, I should not be displeased to find that it was so; but under these circumstances I cannot give Mr. Hooper any relief upon this part of the case."

From this part of the judgment the plaintiff appealed.

P. O. Lawrence, K.C., and T. B. Napier, for the appellant:

The plaintiff is the person damaged, as he had to make up the difference caused by the fall in the price of the shares. He had

only pledged the shares to the bank, and he could have sold subject to their charge. The bank have lost nothing, as he is a solvent person. He is, therefore, the person entitled to damages. The obligations of a transferor of shares in a company are stated by Lord ESHER, M.R., in *Skinner v. City of London Marine Insurance Corporation* [1885] (2) and *London Founders' Association v. Clarke* [1888] (1). His duty is to execute a valid transfer of the shares and hand it to the transferee, and to do all that is within his power to enable the transferee to get registered. A transferee under a blank transfer, as soon as it is filled in, is in the same position as a transferee under a transfer filled in at once. There is privity of contract between the transferor and him.

[ROMER, L.J.: He may have the rights of a transferee, but has he all the rights of a person who has paid for the transfer?]

An equitable mortgagee of shares cannot give a greater right than he himself has : *France v. Clark* [1884] (3), in which *In re Tahiti Cotton and Coffee Plantation Co., Ex parte Sargent* [1874] (4), was distinguished and observed upon ; but that difficulty does not arise here. *Gurney v. Seppings* [1846] (5) is in point.

The plaintiff was entitled to be registered in the absence of anything to show that anyone else had a better title : *Moore v. North-Western Bank* [1891] (6). He would have a right to require that under section 85 of the Companies Act, 1862.

[ROMER, L.J., referred to *In re East Wheal Martha Mining Co.* [1863] (7).]

The obligation is really part of the express contract, and it makes no difference that that contract was made through Herts as agent. It may also be put on the ground of an estoppel preventing Whatton from saying that he did not agree to transfer the shares and to carry through the legal incidents of a transfer. Whatton, therefore,

(2) 14 Q. B. D. 882, 887 ; 54 L. J. Q. B. 437, 439 ; 53 L. T. 191 ; 33 W. R. 628.

(3) 26 Ch. D. 257 ; 53 L. J. Ch. 585 ; 50 L. T. 1 ; 32 W. R. 466.

(4) L. R. 17 Eq. 273 ; 43 I. J. Ch. 425 ; 22 W. R. 815.

(5) 2 Ph. 40 ; 1 Coop. t. Cott. 12 ; 15 L. J. Ch. 385.

(6) [1891] 2 Ch. 599, 604 ; 60 L. J. Ch. 627, 629 ; 64 L. T. 456 ; 40 W. R. 93.

(7) 33 Beav. 119.

is liable in damages to the plaintiff for the delay caused by the non-registration of the shares in the plaintiff's name, which prevented the plaintiff from realising them while they still possessed some value. KEKEWICH, J., considered that an action lay against Whatton for the breach of his obligation, but refused relief on the ground that the plaintiff could only sue on behalf of the Mines Corporation, and that the Mines Corporation had suffered no damage. This, however, is not the true view of the facts. The plaintiff was as much interested in the security as the Mines Corporation, and he suffered damage from its depreciation in value to the extent of his own personal liability to the corporation. The measure of those damages will be the value of the shares at the end of March, 1904, when Whatton stopped the registration, since they had no value when, as the result of this action, the plaintiff for the first time became entitled to deal with them. The principle is the same as in an action to replace stock: *Sanders v. Kentish* [1799] (8), *Owen v. Routh* [1854] (9), and *Shepherd v. Johnson* [1802] (10).

Stewart-Smith, K.C., and Cozens-Hardy, for the respondent:

First, this is not a case in which any obligation such as is mentioned by Lord ESHER, M.R., in *London Founders' Association v. Clarke* (1), ought to be implied on the part of Whatton, and KEKEWICH, J. (who was against us on this point), was wrong in the view which he took of it. Such an implied obligation only arises by virtue of the contract between the parties, and not by the mere conveyance. In the present case the liability of Whatton arises not by contract (for Herts exceeded his authority), but only by estoppel; and the transfer (the validity of which Whatton is estopped from denying) is simply a grant of the shares, and implies nothing more. There is no authority for saying that such an obligation can be implied from the mere existence of the transfer.

[*Per Curiam*: We should draw the obligation from the transfer by itself if necessary.]

(8) 8 Term Rep. 162.

(9) 14 C. B. 327; 23 L. J. C. P. 105; 2 C. L. R. 365; 18 Jur. 356; 2 W. R. 222.

(10) 2 East, 211.

Secondly, assuming that to be so, still KEEWICH, J., was right in holding that Hooper is not entitled to damages. His name was inserted in the transfer as a mere nominee for the Mines Corporation, and they have suffered no loss. Hooper was a mere abstraction *x*, without any beneficial interest.

[ROMER, L.J.: Hooper had a substantial interest in realising the security at the best price.]

COLLINS, M.R., stated the facts at some length, and continued: The question is now whether under those circumstances there is any right of action for damages against Whatton. The learned Judge in the Court below had no doubt upon that part of the matter. He followed—at all events, if it was not cited to him, it was cited to us—the *dictum* of Lord ESHER, M.R., upon that point, the question being whether a transferor who has transferred shares, I will assume, for value, is under an obligation not to hinder the purchaser or the transferee from obtaining the benefit of that transfer—the full benefit involved in the fact that the transferor has transferred the shares. I will read the passages in which Lord ESHER expressed himself in the case of *London Founders' Association v. Clarke* (1), but before reading them perhaps I ought to state the facts of the case, which I take from the headnote: “A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use:—*Held*, following *Stray v. Russell* [1860] (11), that the contract for the sale of shares on the

(11) 1 E. & E. 888, 916; 29 L. J. Q. B. 115; 6 Jur. (N.S.) 168; 1 L. T. 443; 8 W. R. 240.

Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable." Now, what the MASTER OF THE ROLLS says is this: "It seems to me that to hold the plaintiff's contention to be correct would be in direct contravention to what was so said"—that is, the contention that there was a total failure of the consideration giving the plaintiff the right to recover back his money—"I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be if he did, it is unnecessary now to consider. There is nothing here to show that the seller in this case did anything of the kind." Again, in a later passage, he says, "The purchaser takes that risk on himself"—that is, the risk of the company approving the transfer—"and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser."

Now, as I have already said, Mr. Justice KEKEWICH had no doubt whatever upon that part of the case. He thought that an obligation had arisen upon Whatton not to interfere with the lawful results of anything done under the authority of that transfer, and therefore the only question in his mind was whether, there being a breach of that obligation on the part of Whatton by intervening and stopping the registration of these shares, the plaintiff was in a position to claim damages. In the argument before us the point has been insisted upon that there is no such obligation as that recognised by Mr. Justice KEKEWICH to the extent which I have mentioned and asserted as existing by Lord ESHER. That point has been argued before us by counsel for the respondent, and they also rely strongly on the other point upon which Mr. Justice KEKEWICH decided the case—namely, that the plaintiff is not in a position to claim damages. Now, as regards the first point, it seems to me quite clear, for the reasons given by Lord ESHER, that there does arise out of the relation constituted between the parties by the transfer an obligation or a duty—whether arising out of the contract or arising out of the relation between the parties—that the grantor shall do nothing to interfere with the grantee obtaining the benefit of his grant. That, it seems to me, is the principle involved—

namely, that there is such a duty arising out of the relation of the parties. It is not one which is in express terms contracted for between the parties, and it is not to be found in express terms in the transfer itself. The transfer itself contains the grant by which the relation of grantor and grantee is created between the parties, and that carries with it an obligation not to interfere with the full fruition by the grantee of all that the grantor has purported to give him under the grant.

That seems to me enough to establish the obligation : the breach of it is not denied ; and therefore we come under these circumstances to the question of damages—Ay or no? Is the plaintiff in this case entitled to claim damages? My first answer is, Why not? Here is a legal transferee suing a legal transferor for an admitted breach of a proved obligation. Why is he not entitled to his damages? If we were in a Court of common law, I do not think there could be much doubt about it. *Prima facie* there is a clear right in a legal transferee, entitled to the performance of a particular obligation, to have damages paid to him measured by the loss which he in his position as legal owner can be fairly said to have suffered by reason of the breach of that obligation. Why, in this case, is he not entitled to his damages? The suggestion made is that his right in this case was not a beneficial right existing in himself; but that contention, to be of any use, must go to the length of saying that he was a mere nominee for the mining corporation who had lent the money on the security of the transfer, and that, being a mere nominee, he has no right of action in himself at all—he is merely their *pret nom*—and that in order to see whether damages ought to be awarded it must be assumed that the real parties to the action are those for whom he is a *pret nom*; and inasmuch as the mining corporation who lent this money have got the security of a solvent person—namely, the plaintiff himself—they cannot complain that they have suffered anything by the interference by Whatton with the complete fruition of the transfer of the shares—that is to say, since Hooper can and will pay them, they cannot sue, and though Hooper must and will pay them, he cannot sue. It seems to me that to give weight to that contention would be to shut one's eyes to the common-sense of the matter in endeavouring to appreciate a very subtle equitable distinction. I think we are entitled to look at the broad

facts. It is not the case of Hooper putting in suit his rights against the rights of the lending corporation ; on the contrary, he and the lending corporation are acting together in this matter for the common purpose of realising the security to the best advantage, having regard to their mutual relations. Undoubtedly, as between the lending corporation and Hooper the value of that security would be of importance in reduction of the obligation of Hooper to the corporation, and the person primarily interested—since he was the person who would ultimately have to pay under any hypothesis—in introducing the value of that security into the discussion was Hooper. If the value of those shares could be realised, the realisation would enure ultimately for the benefit of Hooper, either because it would reduce his obligation to the corporation if the corporation took the money at the time, or, if Hooper paid off the corporation, then because he would be able to apply the money realised from the security in mitigation, so far as it would go, of his own damages ; so that, in measuring this case by the ordinary standards which would be applied at common law, we are entitled to look at it, or, if a jury were assessing it, we should be entitled to tell the jury that they must look at it, reasonably, and say what, as reasonable men, they would expect to be the damages that would be suffered by a person in Hooper's position under those circumstances. A jury are not bound to ascertain, they cannot ascertain absolutely and with mathematical nicety, the precise damage that a person must suffer. They have to look at the reasonable probabilities of the case, and in that view they have got to compensate a person as far as they can for the loss which in their view, having regard to all the circumstances of the transaction, he has suffered arising naturally out of the breach for which the defendant is responsible.

In this case the act of the defendant has prevented the benefit which would otherwise have accrued to the persons entitled in the exercise of their right to deal with those shares at the time when the defendant entered into his obligation. If that right had existed Hooper was the person in law, as between him and the defendant, who was entitled to the benefit of it. In my opinion it would be enough as against Whatton in this action to say, " You are the transferor in this matter, and you cannot, as against your

transferee, set up these nice considerations or go behind the actual transaction." But if we do go behind the actual transaction we must not take leave of our common-sense ; and we find that, taking all these equities into consideration, the net result of the matter is that the lending corporation are only not sufferers because they are paid by Hooper ; and if they are paid by Hooper why should not Hooper get the benefit which he was entitled to from the transferor ? It seems to me, therefore, that the person who really suffers in this matter by the action of Whatton is Hooper, and Hooper is the person who is entitled to receive damages from Whatton.

Although, therefore, I agree with the grounds on which Mr. Justice KEKEWICH decided this case as a whole, I am unable to take the view which he has taken on this particular point, and I think that his mistake lay in treating Hooper as a person who was merely, as counsel put it in their short and perfectly logical argument, a person with no beneficial interest. But when we see the actual facts of this case, it is clear that Hooper was not a mere nominee ; he was really the person beneficially interested in the realisation of the value of the security. If Hooper had been, as counsel for the respondent very ingeniously argued he ought to be, treated as being an abstraction *x*—a person with no beneficial interest, merely lending his name for the purposes of the writ—then I should accept counsel's position ; but in the course of the argument Lord Justice ROMER declined to take the first step, and I do not feel any more inclined to take it than he did. I decline to measure it by the abstraction *x*. I prefer to treat Hooper as a person beneficially interested in the security.

What, then, is the result ? There is a right to damages measured by the loss to Hooper ; and the loss to Hooper was what, as a reasonable person, he might have got by realising that security at the time of the breach. That does not seem to me to involve that he must be taken as bound to force the whole of those shares on the market at one and the same time. I think if the matter were before a jury they would be asked to treat it as reasonable men, and to consider what in the hands of a person anxious to realise the security to the best advantage, acting reasonably—not taking an undue time about it, but dealing with it prudently—

what, in their view, would be the value of shares so realised, realised to the best advantage, having regard to the nature of the shares, the state of the market, and the possible depreciation of the shares by waiting an undue time. Of course a man would have to act reasonably, and a jury would have to make the best estimate they could of how much he would have got by realising the shares on that footing; and to that extent, and to that extent only, the loss is measured by the difference between the ultimate value at the time when he got the dominion of the shares and their value to him if he had had an opportunity of realising them at the time and in the way which I have suggested. That will be the standard, and that will have to be ascertained by the Master. I do not think that there will be any very great difficulty about it, because there was evidence before the learned Judge of the state of the market during the material period in question. It is not a case of a given sale on a particular day. The Master will have to consider all the circumstances—the amount that had to be disposed of and the prices, so far as he can ascertain them, ruling during that time.

Therefore it seems to me that the appeal must be allowed, and there must be the inquiry which I have suggested.

ROMER, L.J.: I am of the same opinion. The learned Judge in the Court below has found—and there is no appeal from that part of the judgment—that the transferor of the shares, the defendant Whatton, must be held to have authorised what was in fact done in this case with regard to the shares—namely, the charge in Hooper's favour, and a subsequent mortgage by Hooper of the shares to the Mines Corporation, and the filling in of the name of Hooper as transferee in the blank transfer. That being so, as between Whatton and Hooper, Whatton is in the position of a transferor to Hooper; and it is to be noticed that Hooper had a direct interest in the shares, not only in respect of the Mines Corporation, but in his own right as equitable mortgagee before the mortgage to the Mines Corporation, and also because of his position as mortgagor to the Mines Corporation. And therefore, with reference to the argument of counsel for the respondents to this appeal, when for the purposes of the Mines Corporation, or

the Mines Corporation and Hooper, Hooper's name was put in as transferee of these shares, it appears to me impossible to say that Hooper, in regard to that position, is to be considered as having no interest whatever in the shares except as a mere nominee for the Mines Corporation. I think, on the facts, his name must be taken to have been put in as nominee because he also occupied the position of mortgagor, and had otherwise an interest in these shares. That being so, it appears to me that the defendant Whatton cannot say, as against Hooper, that the latter, as transferee, has no interest in these shares except as representing the Mines Corporation.

It is not necessary for me to decide it, but I should like to point out that I am not sure that any difference would have arisen in this case if Hooper's name had not been put in as transferee and a third name had been put in—I am not at all sure that even in that case it could not be said on behalf of Hooper and of the Mines Corporation that the name of that third person had been used for the purpose of both; but I need not consider that in this case. It is sufficient to say here that, to my mind, it is established that Whatton is the transferor of these shares to Hooper, and that Hooper stands in the position of having acquired that position of transferee for valuable consideration.

Under those circumstances, speaking for myself, I feel no doubt that there is an implied duty and obligation as between Whatton and Hooper that Whatton will do nothing to prevent Hooper being entered on the register of shareholders so as to acquire the full benefit to be derived from the transfer. What happened was this: An application was made to the company to register Hooper's name as transferee. That was an application made at the time. There was no dispute of any kind as between the Mines Corporation and Hooper; in fact, there never has been any dispute between these two. In this matter they appear always to have acted amicably, their interests being practically identical. An application being so sent in, registration, but for the conduct of the defendant Whatton which I am about to refer to, would have followed in due course, and that registration, as I need scarcely point out, would have enured for the benefit of Hooper and of his mortgagees, the Mines Corporation. What happened then was this: In breach of his duty or obligation, Whatton gives notice to the company not to

recognise the transfer of the shares, representing in fact that the transfer was not valid as against him. To my mind that was a clear breach of the duty or obligation which he owed to Hooper. The result of that breach of his duty was that the shares were not registered. Who suffered from that? Hooper certainly suffered from it. Hooper, the transferee, whose name ought to have been put on the register, owing to the breach of duty to him on Whatton's part failed to get on the register; he, as representing himself and his mortgagees, lost the benefit at that time of the transfer through the defendant Whatton's breach of duty or obligation. It was by reason of that breach of duty that Hooper, as representing both himself and his mortgagees, failed to get the full benefit of the transfer, or indeed any benefit from the transfer, till the judgment in this action, when their right to have the transfer perfected by registration was decided against Whatton.

To my mind there has clearly been damage caused by the delay which has arisen by reason of the defendant Whatton's breach of duty to Hooper, for it is admitted that between the date when this transfer ought to have been registered and when Hooper, as representing himself and his mortgagees, could have obtained, and would have obtained if the registration had been proceeded with, the full benefit of these shares, and the time when ultimately he was enabled to get a decision in his favour as against Whatton, there was a depreciation in the value of the shares. To my mind the measure of damages caused by the breach of duty and the delay is the difference between those two values. I really could not add anything to what the MASTER OF THE ROLLS has said as to the way in which that damage ought to be estimated. In estimating the value of those shares at the time when registration ought to have been effected, the Master, who has to estimate the value, must try to ascertain the value in a reasonable way. Of course, amongst other considerations, he will bear in mind that the number of shares involved in this transfer was such that they could not have been sold on the market probably in one block, but would have had to be dealt with by degrees. That and all other material considerations bearing upon the question, without any special direction from us will, of course, be taken into consideration by the Master

With regard to the proceedings by Hooper, Hooper, to my mind, when he started this action, must be held to have made his claim for damages for delay on behalf of those who claimed through him—that is to say, if any damages had been suffered by his mortgagees he would have been held, I should have thought, to sue as representing them as well as representing himself; but in the events that have happened, seeing that pending the trial he has paid those mortgagees off, it follows that the full amount of damages which will be found as the result of the inquiry before the Master will have to be paid to him entirely, so that he alone will be entitled to receive the amount of damage.

The result is that we discharge so much of the order in the Court below as dismisses the claim for damages and direct an inquiry before the Master; the costs of that inquiry will be reserved in the usual way, with liberty to apply as to those costs when the amount of damage is ascertained; and the respondent will be ordered to pay so much of the costs of the action as related to the claim for damages which the appellant did not get in the Court below, and the costs of this appeal.

COZENS-HARDY, L.J.: I am of the same opinion, and I have nothing to add.

Appeal allowed.

Solicitors : *G. L. Matthews & Co.*, for Appellant.
Thorp & Saunders, for Respondent.

BOSCHOEK PROPRIETARY CO v. FUKE.

1905, November 30; December 1, 2, 4, 5, 6, 21. SWINFEN EADY, J.

Company—Director—Share Qualification—“Hold in his own Right”—Holding as Liquidator—Income Tax on Directors’ Fees—De facto Directors—Irrregularity—Ratification—Powers of General Meeting—Notice.

A person who is entered on a company's register as holding shares as liquidator of another company does not hold the shares "in his own right" so as to acquire a qualification as director under an article requiring a director to hold his share qualification "in his own right."

Where not authorised by the articles of association, the payment by the directors of the income tax on their fees out of the company's funds is an illegal payment.

Where a general meeting is called by the only acting directors of a company, acting as a board and pursuant to a resolution of the board, and notice thereof is duly sent to the shareholders of the company, and one of the objects of the meeting is to confirm past proceedings, the fact that one or more of the directors have been irregularly appointed will not invalidate a resolution passed at the meeting.

Browne v. La Trinidad (1) and *British Asbestos Co. v. Boyd* (2) followed.

In re State of Wyoming Syndicate (3) distinguished.

Where the amount of directors' remuneration is fixed by the articles of association, and the directors have voted themselves a sum in excess of that amount, a general meeting cannot ratify the irregularity without first altering the articles.

Where a notice convening a general meeting states that the shareholders will be asked to ratify the election of a director and to receive the directors' report and accounts, this is a sufficient notice to bring the question of ratification within the competency of the meeting.

Irvine v. Union Bank of Australia (4) followed.

TRIAL of action.

Action by the Boschoek Proprietary Co., Limited, to recover from Francis George Fuke and Cuthbert Oliver Rigby, late directors of the plaintiff company, moneys alleged to have been improperly applied by them.

The plaintiff company was incorporated on 20 November, 1895, with a nominal capital of 360,000*l.*, divided into 360,000 shares of 1*l.* each, for the purpose of acquiring and working lands, mines, and

(1) 37 Ch. D. 1; 57 L. J. Ch. 292; 58 L. T. 137; 36 W. R. 289.

(2) 11 Manson, 88; [1903] 2 Ch. 439; 73 L. J. Ch. 31; 88 L. T. 763; 51 W. R. 667.

(3) 8 Manson, 811; [1901] 2 Ch. 431; 70 L. J. Ch. 727; 84 L. T. 868; 49 W. R. 650.

(4) 2 App. Cas. 366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682.

claims in South Africa. Of these shares, 300,000 were issued as fully paid to the vendors, the Heidelberg Estates and Exploration Co., Limited. The remaining 60,000 shares (other than the seven shares agreed to be taken by the subscribers to the memorandum) were unissued. The company had no cash capital; but in or previous to 1899 it had borrowed 17,500*l.* from the Heidelberg Co. on debentures for that amount.

The articles of the plaintiff company provided that—

Article 5. No person should be recognised by the company as holding any share upon any trust, and the company should not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or (except as thereafter provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered owner.

Article 27. The survivor or survivors of a deceased joint holder of shares, and the executors or administrators of a deceased sole holder, should be the only persons recognised by the company as having any title to their or his shares.

Article 28. Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of a member, might be registered as a member upon such evidence being produced as might from time to time be required by the directors, and upon his signing a proper instrument whereby he should agree to take and hold such share subject to all conditions affecting the same.

Article 41. The directors might whenever they thought fit, and they should upon a requisition made in writing by one or more members holding not less than one-fifth of the share capital of the company, convene an extraordinary general meeting.

Article 44. Seven days' notice at least specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, should be given to the members in manner thereafter mentioned, or in such manner, if any, as might be prescribed by the company in general meeting, but the accidental omission to give such notice to, or the non-receipt of such notice by any member, should not invalidate any resolution passed or proceedings had at any general meeting.

Article 45. All business should be deemed special that was

transacted at an extraordinary meeting, and any that was transacted at an ordinary meeting should be so considered, with the exception of the consideration of the accounts, the balance-sheet, and the report of the directors, the declaring of a dividend, and the election or appointment and remuneration of directors and auditors or other officers.

Article 64. The number of directors should not be less than four nor more than nine.

Article 65. The first directors should be appointed by a written instrument signed by any five or more of the subscribers to the memorandum of association.

Article 66. The qualification of every director so appointed should be the holding in his own right of at least 250 fully paid shares. A director might act before acquiring his qualification, but should, if he accepted office, be bound to acquire the same within one month after his appointment or election.

Article 72. Every director should vacate his office on ceasing to hold his qualifying number of shares.

Article 75. Any occasional vacancy in the office of director might be filled up by the appointment of a qualified member.

Article 76. The continuing directors might act, notwithstanding any vacancies in their body, provided that the number of continuing directors should never be less than four, but one director might act for the purpose of filling up vacancies on the board.

Article 77. The directors should be entitled to receive by way of annual remuneration a maximum sum of 500L., and also a sum equal to 10 per cent. of the annual profits of the company remaining after 10 per cent. upon the capital of the company paid up, or credited as paid up, for the time being, had been earned, whether distributed or not, such remuneration to be divisible as the board might determine. If in the opinion of the board it was desirable that any of their number should make special journeys or perform any special services on behalf of the company or its business, such director or directors should be paid such reasonable additional remuneration and expenses for the same as the board or the company might from time to time determine.

Article 79. The directors might delegate any of their powers,

other than the power of making calls, to committees consisting of such member or members of their body as they thought fit.

Article 81. Until otherwise determined, two directors should be a quorum.

Article 84. All acts done by any meeting of directors, or of committee of directors, or by any person acting as a director, should, notwithstanding that it might be afterwards discovered that there was some defect in the appointment of any such director or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Article 87. The directors might appoint a manager or managers, secretary or secretaries, solicitor or solicitors, and such other officers, clerks, and servants, permanent, local, special, or temporary, as and upon such terms and conditions as they might deem expedient or necessary.

Article 91. No director or other officer of the company should be liable for any other director or officer, or for joining in any receipt or other act for conformity.

On 24 April, 1896, the defendant Fuke was appointed secretary of the plaintiff company at a salary of 100*l.* a year. He held this office up to 25 March, 1903.

On 15 February, 1894, the directors resolved that their 500*l.* remuneration should be divided as follows—namely, 200*l.* per annum to the chairman and 100*l.* per annum to each of the remaining directors. There were then four directors. This resolution was never altered.

On 27 February, 1900, the Heidelberg Co. went into voluntary liquidation, and the defendant Fuke was appointed liquidator.

At that date the Heidelberg Co. held 275,500 shares and 17,500*l.* debentures of the plaintiff company. It had also a claim against certain shareholders of the plaintiff company in respect of which the liquidator recovered 500 shares. On 28 August, 1901, these shares were transferred to Francis George Fuke, "Liquidator of the Heidelberg Estates and Exploration Co., Limited, 167, Winchester House, Old Broad Street, London," and on 6 September, 1901, they were registered under that name and description.

The number of directors was not kept up to four, and on 9 October, 1901, only two directors were left: Frost and Polkinghorne.

On 4 December, 1901, these two directors purported to hold a board meeting and to pass the following resolution: "That Mr. Francis George Fuke be, and he is hereby appointed, managing director of the company at a remuneration of 700*l.* per annum for a period of two years, and to be at liberty to retain his position as secretary of the company at a salary of 100*l.* per annum, provided that the said Francis George Fuke draws only at the rate of 200*l.* per annum as managing director until the working capital of the company of 60,000*l.* or part thereof has been subscribed."

At this date Fuke had only ten shares of his own in addition to those which he held as liquidator.

No part of the 60,000*l.* was in fact subscribed, but the defendant Fuke drew or credited himself with the whole salary. The debenture interest was in arrear, and all that was left of the 17,500*l.* was a sum of 950*l.* on deposit, and 100*l.* on current account. There was, in fact, nothing to manage; all that there was to do was to endeavour to procure working capital.

On 19 August, 1902, Polkinghorne died, and on 28 January, 1903, Frost, having transferred his qualification shares, ceased to be a director.

On 2 February, 1903, Fuke, claiming to be sole director, purported to hold a board meeting, and passed transfers of 250 shares to himself, 250 to Hughes, and 250 to the defendant Rigby, which were registered on 5 February, 1903. The shares transferred to the defendant Fuke constituted a sufficient qualification, but he was not subsequently appointed a director.

On 3 February, 1903, the defendant Fuke purported to hold a board meeting, and appointed Hughes and the defendant Rigby directors jointly with himself.

On 5 February, 1903, a meeting of the board so constituted was held, and, as recorded in the minutes, "it being stated that it is usual for the tax on the managing directors' fees to be paid by the companies, it was resolved that the sum of 8*l.* 4*s.* 8*d.* income tax on the managing directors' fees be paid out of the funds of the company."

On 9 February, 1903, a board meeting, similarly attended, was

held, at which cheques for income tax on the fees of the three directors were drawn.

Questions having subsequently arisen as to the validity of the past acts of the directors, counsel's opinion was taken, and it was determined to alter some of the articles.

On 14 May, 1903, a board meeting was held, at which the secretary was instructed to convene a general meeting for 25 May, for the purpose of passing the following resolutions :

(1) A resolution altering article 64 by providing that the number of directors should not be less than two, with a corresponding alteration in article 76 ;

(2) A resolution empowering the board to appoint one of their body as a managing director, and to fix his remuneration ;

(3) A resolution that all acts theretofore done by any persons purporting to act as directors of the company should, if such acts would have been binding on the company if done by a duly constituted board, be binding on the company ;

(4) A resolution ratifying and confirming the board's resolution of 4 December, 1901.

On 25 May the meeting was held, and the resolutions were passed unanimously.

On 11 June, 1903, an extraordinary meeting was held at which the first two resolutions were confirmed.

On 28 June, 1903, Hughes resigned.

On 31 July, 1903, notice was given that the ordinary general meeting would be held on 10 August, 1903, for the purpose of receiving the directors' report and accounts to 30 June, 1903, and the election of directors and auditors. The directors' report, which was sent with the notice, contained (*inter alia*) the following statement :

" Directors.—You will be asked to ratify the election of Mr. C. O. Rigby as a director, also to elect a new director."

On 10 August, 1903, the ordinary general meeting was held, at which it was unanimously resolved "that the election of Mr. C. O. Rigby as a director of the company on 3 February, 1903, be, and the said election is hereby, ratified."

This resolution was relied on by Rigby as ratifying his appointment as from February, 1903. He claimed that he was entitled to

at least two years' salary at 100*l.* from that date up to his resignation on 3 March, 1905. He had in fact received 198*l.* 10*s.* 8*d.* for salary up to 31 December, 1904.

In January, 1905, the Heidelberg Co. was reconstructed under a scheme by which the new company was, in effect, to finance and manage the plaintiff company, and under which scheme it advanced 2,000*l.* to discharge the liabilities of the plaintiff company (other than debentures and interest).

On 10 March, 1905, the defendants Fuke and Rigby, purporting to act as a board, drew a cheque in favour of the defendant Fuke for 1,629*l.* 18*s.* 10*d.*, which was cashed and paid out of the 2,000*l.* provided by the new company. Of this sum 1,543*l.* 18*s.* 10*d.* was applied by Fuke in part payment of his claim for his remuneration as managing director, and was accepted by him in full satisfaction thereof.

As ratifying this payment, certain resolutions passed at general meetings on 12 and 28 January and 25 February, 1905, were relied upon by Fuke and Rigby, but on the evidence the Court held that there had been no sufficient ratification by the shareholders with knowledge of the facts.

The plaintiff company claimed (*inter alia*), first, a declaration that the payment to the defendant Fuke of the 1,543*l.* 18*s.* 10*d.* out of the assets of the plaintiff company was a misapplication of the funds of the plaintiff company, and that the defendants Fuke and Rigby were jointly and severally liable to account to the plaintiff company for the sum of 1,543*l.* 18*s.* 10*d.*, together with interest at the rate of 5 per cent. per annum; secondly, a declaration that the payment to the defendant Fuke out of the assets of the plaintiff company of the sum of 8*l.* 4*s.* 8*d.* was a misapplication of the plaintiff company's funds, and that the defendants Fuke and Rigby were jointly and severally liable to account to the plaintiff company for such sum, with interest at the rate aforesaid; thirdly, a declaration that the payment to the defendant Rigby of the sum of 190*l.* 10*s.* 8*d.* out of the assets of the plaintiff company was a misapplication of the plaintiff company's funds, and that the defendants Fuke and Rigby were jointly and severally liable to account to the plaintiff company for such sum, with interest at the rate of 5 per cent. per annum; and fourthly, payment of the foregoing

sums pursuant to the foregoing declarations, with interest as aforesaid.

Eve, K.C., and F. Cassel, for the plaintiff company:

The resolution of the board of 4 December, 1901, appointing the defendant Fuke managing director at a salary of 700*l.* a year, was invalid on the following grounds: first, there was no board competent under articles 64 and 76 to summon a meeting; secondly, there was no power under the articles to appoint a managing director; thirdly, the defendant Fuke did not hold in his own right the 250 fully paid shares required by article 66: *Bainbridge v. Smith* [1889] (5) and *Sutton v. English and Colonial Produce Co.* [1902] (6); fourthly, the remuneration paid to Fuke was in excess of that prescribed by article 77; and fifthly, the offices of director and secretary were incompatible, and, in the absence of express authority, could not be held by the same person: *Iron Ship Coating Co. v. Blunt* [1868] (7) and *Rex v. Tizzard* [1829] (8).

The resolution passed at the general meeting on 25 May, 1903, ratifying the resolution of 4 December, 1901, is also invalid, as there was not at that time any properly constituted board which could summon a meeting: *In re Haycraft Gold Reduction, &c., Co.* [1900] (9), and *In re State of Wyoming Syndicate* [1901] (3). Further, the general meeting could not pass resolutions inconsistent with articles 66 and 77. The articles must first be altered: *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* [1882] (10), and *Harben v. Phillips* [1888] (11).

The condition precedent on which Fuke's right to receive 700*l.* a year arose was never fulfilled, and his claim therefore to receive it cannot be supported: *Caridad Copper Mining Co. v. Swallow* [1902] (12).

(5) 41 Ch. D. 462, 474; 60 L. T. 879; 37 W. R. 594.

(6) 10 Manson, 101; [1902] 2 Ch. 502; 71 L. J. Ch. 685; 87 L. T. 438; 50 W. R. 571.

(7) L. R. 3 C. P. 484, 489; 37 L. J. C. P. 273; 16 W. R. 868.

(8) 9 B. & C. 418; 4 M. & R. 400; 7 L. J. (o.s.) K. B. 275.

(9) 7 Manson, 243; [1900] 2 Ch. 23; 69 L. J. Ch. 497; 83 L. T. 166.

(10) 23 Ch. D. 1; 49 L. T. 147; 31 W. R. 330.

(11) 23 Ch. D. 14; 48 L. T. 834; 31 W. R. 193.

(12) 9 Manson, 336; [1902] 2 K. B. 44; 71 L. J. K. B. 601; 86 L. T. 699; 50 W. R. 565.

Where not authorised by the articles, the payment by the directors of the income tax on their fees out of the company's funds is clearly an illegal payment.

The appointment by the defendant Fuke of the defendant Rigby as a director on 8 February, 1908, was invalid, as the defendant Fuke was not then a director. No doubt he was duly appointed a director at the meeting held on 10 August, 1908, but the purported ratification on that occasion of his earlier appointment was ineffectual, as the notice convening the meeting did not refer to this special business, as required by article 44. Having served for under the two years, he is only entitled to salary for one full year: *Salton v. New Beeston Cycle Co.* [1899] (18).

Micklem, K.C., and Frank Russell, for the defendant Fuke:

Whatever difficulties there may be in maintaining that the appointment on 4 December, 1901, of the defendant Fuke as managing director was a valid appointment, that appointment was effectually ratified at the extraordinary general meeting of 25 May, 1903. That meeting was duly convened by the *de facto* directors, and everything was honestly done. Under those circumstances the Court will not inquire into the irregularity in the constitution of the board: *Browne v. La Trinidad* [1887] (1), *Grant v. United Kingdom Switchback Railways Co.* [1888] (14), *British Asbestos Co. v. Boyd* [1903] (2), *Southern Counties Deposit Bank v. Ryder* [1901] (15), and *Ho Tung v. Man On Insurance Co.* [1901] (16).

Haycraft Gold Reduction, &c., Co. (9), and *In re State of Wyoming Syndicate* (8), are distinguishable. There the meetings were summoned by the secretary without any authority from the directors.

Further, at the date of his appointment on 4 December, 1901, the defendant Fuke was sufficiently qualified under article 66. The plaintiff company, having regard to article 5, which is in very general terms, was bound to disregard his description as liquidator and to treat him as entitled in his own right to the shares in

(13) 6 Manson, 238; [1899] 1 Ch. 775; 68 L. J. Ch. 370; 80 L. T. 521; 47 W. R. 462.

(14) 40 Ch. D. 135; 58 L. J. Ch. 211; 60 L. T. 525; 37 W. R. 312; 1 Meg. 117.

(15) 73 L. T. 374.

(16) 9 Manson, 171; [1902] A. C. 232; 71 L. J. P. C. 46; 85 L. T. 617.

respect of which he was registered. The plaintiff company cannot go behind its own register. As between him and the plaintiff company, the defendant Fuke could deal with the shares as he pleased. It was not necessary that he should have a beneficial interest in them : *Bainbridge v. Smith* (5) and *Sutton v. English and Colonial Produce Co.* (6).

The appointment of the defendant Fuke may be justified either, first, as an appointment of a manager under article 87, or, secondly, as a delegation by the directors of their powers to a committee of one under article 79. His remuneration may be justified as a payment of additional remuneration under article 77. In any case the company could ratify past acts of the directors, though contrary to the articles : *Irvine v. Union Bank of Australia* [1877] (4). It is admitted that the payment of income tax on the directors' fees out of the funds of the company was *ultra vires*.

Gore-Browne, K.C., and Austen-Cartmell, for Rigby :

Admitting that the defendant Fuke was not properly appointed a director on 4 December, 1901, he was nevertheless duly qualified, under article 66, on that date to be so appointed. The shares were not held by him in a representative capacity, for example, as an executor or trustee in bankruptcy, but as trustee for the Heidelberg Co. Having regard to article 5 and section 30 of the Companies Act, 1862, the plaintiff company was bound to regard him as absolute owner. The plaintiff company could pay no attention to the fact that he was described as the liquidator of the Heidelberg Co., and could therefore deal with him safely as absolute owner : *Société Générale de Paris v. Walker* [1885] (17). Beneficial ownership of the shares is unnecessary : *Bainbridge v. Smith* (5). If necessary, the register could have been rectified retrospectively : *In re Sussex Brick Co.* [1904] (18). In *Sutton v. English and Colonial Produce Co.* (6), the company had notice that the director had become bankrupt, and that his trustee in bankruptcy was claiming to deal with the shares.

(17) 11 App. Cas. 20, 30; 55 L. J. Q. B. 169; 54 L. T. 389; 34 W. R. 662.

(18) 11 Manson, 66; [1904] 1 Ch. 598; 73 L. J. Ch. 308; 90 L. T. 426; 52 W. R. 371.

It therefore knew that the Bankruptcy Act, 1883, had suspended the right of the bankrupt to deal with the shares. There is no such office known to the law as that of a managing director. The defendant Fuke believing himself to be a director, and Hughes and the defendant Rigby being properly qualified, their appointment by the defendant Fuke was valid under article 84 and section 67 of the Companies Act, 1862, and for the same reason these three directors could convene a general meeting under article 41: *Dawson v. African Consolidated Land and Trading Co.* [1897] (19).

As to the resolutions passed at the general meeting on 25 May, 1903, the plaintiff company had notice of all that was done, and was bound by acquiescence in the past act, although it was contrary to the articles: *Phosphate of Lime Co. v. Green* [1871] (20), approved in *Ho Tung v. Man On Insurance Co.* (16).

The defendant Rigby concurred in the payment of 700*l.* a year to the defendant Fuke in good faith, and in the belief that the payment to him of that sum had been ratified by the plaintiff company. He is therefore exonerated by section 91, and by the general law: *Dovey v. Cory* [1901] (21).

Eve, K.C., replied.

December 21.

SWINFEN EADY, J., read the following judgment, in which, after stating the facts down to and including the resolution of 4 December, 1901, appointing Fuke managing director at a remuneration of 700*l.* a year, he proceeded: This resolution was, in my opinion, invalid. By article 64 the number of directors should not be less than four. By article 77 the directors were to be entitled to receive by way of annual remuneration a maximum sum of 500*l.*, with a percentage of profits (if any), such remuneration to be divisible as the board might determine. The articles did not contain any provision enabling the board to appoint any managing director. Under these circumstances it was quite beyond the powers of the two remaining directors to appoint a third person (even if qualified to

(19) [1898] 1 Ch. 6; 67 L. J. Ch. 47; 77 L. T. 392; 46 W. R. 132.

(20) L. R. 7 C. P. 43; 25 L. T. 636.

(21) 8 Manson, 346; [1901] A. C. 477; 70 L. J. Ch. 753; 85 L. T. 257; 50 W. R. 65.

be a director) to be managing director of the company at a salary of 700*l.* a year.

The question, however, has been raised as to whether Fuke was qualified to be appointed a director. By article 75 any occasional vacancy in the office of director may at all times be filled up by the board by the appointment of a qualified member. By article 66 the qualification of a director is the holding in his own right of at least 250 shares, and by article 72 every director shall vacate his office on ceasing to hold his qualifying number of shares. It was contended that article 66 only required a qualification in the case of the first directors appointed by the subscribers to the memorandum, but, having regard to articles 72 and 75, the contention is not in my opinion well founded. Then was Fuke "a qualified member"? The 500 shares which are claimed as a qualification were entered into the company's register as follows: "Francis George Fuke, liquidator of the Heidelberg Estates and Exploration Co., Limited, 167, Winchester House, Old Broad Street, London." Did Fuke hold these shares "in his own right"?

In *Bainbridge v. Smith* (5) Lord Justice LINDLEY pointed out that the phrase "holding shares in his own right" had acquired a conventional meaning, and added: "I think that conventional meaning is this, that a person 'holding shares in his own right' means holding in his own right as distinguished from holding in the right of somebody else. . . . It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares, whatever his interest may be in the shares."

I therefore ask myself these two questions: first, did Fuke hold in his own right, as distinguished from holding in the right of somebody else? and secondly, Could the plaintiff company have safely dealt with him in respect of these shares, whatever his interest in the shares might be?

In my opinion the first question should be answered in the negative. Fuke held the shares in right of the Heidelberg Estates and Exploration Co., Limited, and not in his own right. Suppose he had been described on the register of the company as "F. G. Fuke, trustee of A. B., a bankrupt," or as "F. G. Fuke, executor of C. D., deceased," in neither case would he have held shares in his own right, but in the former case in right of the bankrupt,

and in the latter in right of the testator. So in the present case the description of him on the register as "liquidator of the Heidelberg Estates and Exploration Co., Limited," shows that he held the shares in right of that company, and in his capacity of liquidator of that company. If, on the other hand, he had been registered as "F. G. Fuke, of, &c., accountant," he would have held the shares in his own right within the meaning of the decisions, although he might in fact have been trustee of a bankrupt, or executor of a deceased person, or liquidator of a company. In the present case I am not considering whether it is usual or proper for a shareholder to be put upon the register with the description "trustee of A. B., a bankrupt," or "executor of C. D., deceased," or "liquidator of the X. Company." I am only considering what is the effect of such a registration.

I am also of opinion that the second question, previously mentioned, should be answered in the negative. The plaintiff company could not safely deal with Fuke in respect of the 500 shares, whatever his interest might be in the shares, as it had notice that he held them as liquidator of the Heidelberg Co. Suppose the plaintiff company had taken them as a security for an overdue debt owing by Fuke personally, could the company have pleaded that it took them in good faith, and without notice that they belonged to the Heidelberg Co., of which Fuke was liquidator? Certainly not; the plaintiff company's own register shows that it was as liquidator of the Heidelberg Co. that the shares stood in Fuke's name. In like manner, if the shares had been registered "F. G. Fuke, executor of C. D., deceased," the plaintiff company could not have taken them by way of security from F. G. Fuke for a private debt of his own, and then successfully contended that it had no notice that Fuke was only entitled to the shares as executor of a deceased person. If, on the other hand, the shares had been registered simply "F. G. Fuke, of, &c., accountant," then the plaintiff company could have safely dealt with Fuke on the footing that he held the shares in his own right, even though in point of fact he might have held them as executor of a deceased person or liquidator of a company. (See also *Sutton v. English and Colonial Produce Co.* (6).) I decide, therefore, that the 500 shares were not a qualification for Fuke within the meaning of the articles.

[His Lordship then stated the facts with reference to the appointment by Fuke of Hughes and Rigby as co-directors with himself, and continued:] The first act of the board so constituted is thus recorded in the minutes: "5 February, 1903. Present—F. G. Fuke, managing director, in the chair; T. Hughes; C. O. Rigby. It being stated that it is usual for the tax on managing directors' fees to be paid by the companies, it was resolved that the sum of 8*l.* 4*s.* 3*d.*, income tax on the managing director's fees, be paid out of the funds of the company." Another board, similarly attended, was held on 9 February, 1903, when the only business was drawing cheques for income tax on the fees of three directors. Fuke received 8*l.* 4*s.* 3*d.* This transaction was, in my opinion, quite unjustifiable. Even if the board had been duly constituted, it would have had no right whatever to take out of the company's moneys the sums which each director ought to pay out of his own money for any income tax properly payable by him. The defendants are jointly and severally liable for this misapplication of the moneys of the company, and must repay the amount with interest.

I now proceed to consider the alleged confirmations by the company in general meeting of Fuke's position and salary. Questions were raised as to the validity of the past acts of the directors; the opinion of counsel was taken, certain alterations of the articles were recommended, and on 14 May, 1903, at a board meeting the secretary was instructed to convene a general meeting of the company for 25 May, 1903. The plaintiff company has objected to the validity of any resolutions passed at this meeting on two grounds. The first ground is that there was no duly constituted board which could validly convene a general meeting of the company. This meeting was called by the only persons acting as directors, and the persons who for upwards of three months had been acting as the board; the resolution for calling it was passed at a board meeting; notice of it was duly sent to every shareholder, and one of the objects of the meeting was to confirm the acts theretofore done by persons purporting to act as directors. Under these circumstances I must consider any informality in convening the meeting as a mere irregularity, and not sufficient to invalidate any resolution passed at it. The case is governed by

Browne v. La Trinidad (1), *Southern Counties Deposit Bank v. Rider* (15), and *British Asbestos Co. v. Boyd* (2), rather than by *In re Haycraft Gold Reduction, &c., Co.* (9), and *In re State of Wyoming Syndicate* (3). In the two latter cases the secretary convened the meeting in question without any authority from a board meeting of directors or persons acting as such.

The second ground on which the plaintiff company has objected to the validity of the third and fourth resolutions passed at this meeting is that they could only have been properly passed after the articles had been altered by special resolution. The company in general meeting could not appoint, and could not ratify, as from December, 1901, the appointment of, Fuke as managing director at 700*l.* per annum, as he had not the necessary qualification, and the maximum remuneration of the whole board was fixed by the articles at 500*l.* The articles, until altered, bound the shareholders in general meeting as much as the board. The present case is unlike that of *Irvine v. Union Bank of Australia* (4), to which reference was made, as in that case the limitation of the power of borrowing and mortgaging was merely a limitation of the authority of the directors, and not a limitation of the general powers of the company. It was argued that the acts of the directors in excess of their authority might be ratified by the company and rendered binding, and that contention succeeded. Articles must first be altered by special resolution before the altered articles can be acted upon: *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (10).

It was urged that there was power under article 77, if in the opinion of the board it was desirable that any of its number should perform any special services, to pay him additional remuneration, but there was no duly constituted board to form any such opinion, and that is a condition precedent. See *Caridad Copper Mining Co. v. Swallow* (12). Moreover, no special services are referred to either in the board minutes or the minutes of the general meeting, and the company did not purport to exercise this power in any way.

It was further urged on behalf of Mr. Rigby that he ought not to be under any liability in this matter, as he was acting in good faith under the advice of counsel, and without objection the opinion was

put in evidence; but when looked at it is clear that counsel advised that all the resolutions should be passed as special resolutions, and not merely the first and second; and, moreover, the payment really impeached in this action was made long afterwards, during the present year, and after the question as to it had been raised.

[His Lordship then dealt with the alleged ratification of 1905, and held that the question of Fuke's remuneration had never been placed before the shareholders, and that there was therefore no sufficient ratification with knowledge, and consequently that Fuke and Rigby were jointly and severally liable for the payment, and continued:] The remaining claim is as to Rigby's remuneration. It is alleged that he only served as director one complete year, for which he was only entitled to 100*l.*, but nevertheless has been paid 10*l.* and 180*l.* 10*s.* 8*d.*, making together 190*l.* 10*s.* 8*d.* The argument that Rigby had not served two complete years was based on the contention that his election or appointment by Fuke on 3 February, 1903, had not been duly ratified or confirmed by the company in general meeting on 10 August, 1903, because sufficient notice had not been given that the matter would be dealt with at that meeting. The report of the directors is dated 31 July, 1903, and was sent out with the notice convening the ordinary general meeting for 10 August, 1903. The report contains this paragraph: "Directors.—You will be asked to ratify the election of Mr. C. O. Rigby as a director, also to elect a new director"; and the notice convening the meeting states that the meeting will be held for the purpose of receiving the directors' report and accounts to 30 June, 1903, and the election of directors and auditors. In my opinion this was sufficient notice to the shareholders of the intention to bring before the meeting the ratification of Mr. Rigby's election. See *Irvine v. Union Bank of Australia* (4), where Sir Barnes Peacock, in delivering the judgment of the Court, said that their Lordships "are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present

at the half-yearly meeting." In my opinion this report and notice given amounted to sufficient notice of the business which was intended to be brought forward at the meeting—namely, to ratify the election of Mr. Rigby. The result, therefore, is that this claim fails. The defendants must pay the costs of the action except so far as increased by the claim for alleged excess of remuneration paid to Rigby; the plaintiff company must pay the costs of the action so far as increased by this claim, with the usual set-off.

Solicitors: *Mayo, Elder & Co.*, for Plaintiff Company.
C. R. Woolley, for Defendants.

PEAT v. CLAYTON.

1906, February 13, 14, 20. Joyce, J.

Company—Shares—Equitable Titles—Priority—Notice—Distringas—Negligence—Registration—Lien of Stockbrokers—Rules of Supreme Court, Ord. XLVI.

The owner of shares assigned all his property to the plaintiffs for the benefit of his creditors. The plaintiffs demanded the certificates, but were told that they were abroad. They then gave notice of the assignment to the company, but did not proceed under Order XLVI. The owner subsequently instructed the defendants, his stockbrokers, to sell the shares, which they did, paying the proceeds to the owner and receiving from him the certificates, which they lodged with the company for certification. The company, having notice of the assignment, refused to register the transfers to the purchasers. The stockbrokers thereupon purchased and delivered to the purchasers other shares in substitution for those originally sold. These latter shares the stockbrokers now claimed to have registered in their names:

Held, that the plaintiffs had not disentitled themselves by negligence, and that their prior equitable title must prevail.

ACTION for a declaration that the plaintiffs were entitled to certain shares in the Randfontein Estates Gold Mining Co. and in the Oceana Minerals Co.

On 24 October, 1904, Clayton, the owner of the shares, executed an assignment of all his property to the plaintiffs for the benefit of his creditors. The plaintiffs at once demanded the certificates, but the excuse was given that they were in South Africa. On the next day, 8 November, notice of the assignment was given to both companies by the plaintiffs. On 10 November Clayton instructed the defendants, Messrs. Cohen, who were his stockbrokers, to sell the shares, which they accordingly did. On the 16th he handed the certificates to his brokers, executed a transfer in blank, and received 25*l.* in advance on account. On 30 November the brokers lodged the certificates with the company and got them indorsed with a statement that they had been lodged. On 1 December the transfers were handed to the purchaser's brokers, who paid the purchase-money to Messrs. Cohen, who on the same day handed the balance of the proceeds to Clayton.

In the case of the Randfontein shares the company refused to register the transfer to the purchaser because of the notice given to them by the plaintiffs. The purchasers thereupon demanded other shares from Messrs. Cohen, which they purchased and delivered

in substitution for those originally sold, and which still remained registered in Clayton's name. Messrs. Cohen then applied to Clayton for repayment of the amount which they had paid to him, but without success.

In the case of the Oceana shares the transfer from Clayton was to a Mrs. Russell, and her name was in the first instance entered on the register, but was subsequently struck out, leaving the shares still standing in the name of Clayton. Mrs. Russell then applied to Messrs. Cohen for other shares, which were at once supplied.

Under these circumstances Messrs. Cohen claimed to be entitled to stand in the shoes of the purchasers and to have Clayton's shares registered in their names. Thereupon this action was commenced by the trustees of the deed of assignment against Clayton, the two companies, and Messrs. Cohen, asking for a declaration that the plaintiffs were entitled to the shares and for consequential relief.

Younger, K.C., and H. Johnston, for the plaintiffs :

The equitable title of the plaintiffs is prior in time and therefore must prevail unless the defendant can prove that they had an absolute and unconditional right to be registered before the company received notice of the plaintiffs' claim : *Moore v. North-Western Bank* [1891] (1). That case is very much weaker than the present one. Even if Messrs. Cohen were purchasers of the shares their title would not prevail : *Ireland v. Hart* [1902] (2). This, therefore, is an *a fortiori* case against them. The plaintiffs by giving notice of their claim to the company prevented any subsequent transfer or registration : *Roots v. Williamson* [1888] (3). Mrs. Russell had no unqualified right to the shares. She never was the legal owner, and Messrs. Cohen are not entitled to stand in her shoes. The only way in which they can displace our title is by showing that someone was entitled to become legal holder of the shares before we gave notice to the company. The plaintiffs owe no duty to the defendants, and therefore there is no question of negligence.

(1) [1891] 2 Ch. 599; 60 L. J. Ch. 627; 64 L. T. 456; 40 W. R. 93.

(2) 9 Manson, 209; [1902] 1 Ch. 522; 71 L. J. Ch. 276; 86 L. T. 385; 50 W. R. 315.

(3) 38 Ch. D. 485; 57 L. J. Ch. 995; 58 L. T. 802; 36 W. R. 758.

Hughes, K.C., and E. Clayton, for Messrs. Cohen :

We are entitled to stand in the shoes of Mrs. Russell, who became legal owner by registration, and therefore had the better title. Mrs. Russell was actually registered and wrongly struck out. The company cannot alter the register except by rectification under the Act. On 14 December Mrs. Russell got a legal title by registration. That gets rid of all the questions in *Ireland v. Hart* (2). That and all the other cases assume that registration gives a legal title. The brokers who warranted the transaction and got the shares must be in the same position as the purchaser. Further, the plaintiffs were guilty of negligence. If a claimant does not put a *distringas* on shares he must take the consequences. The plaintiffs by not proceeding under Order XLVI. rule 4 had disentitled themselves by negligence: *National Provincial Bank v. Jackson* [1886] (4), *In re Castell and Brown, Limited, Roper v. Castell and Brown* [1898] (5), and *Farrand v. Yorkshire Banking Co.* [1888] (6). Here the plaintiffs by allowing Clayton to retain the certificates enabled him to sell the shares, and therefore they ought to be postponed. The plaintiffs are prior in time, but that is the last thing to look to as between equal equities, and here they are not equal. The law as to conflicting equities is stated in *Rice v. Rice* [1853] (7). The plaintiffs are estopped by their negligence; but, on the other hand, Messrs. Cohen omitted nothing which they ought to have done or could have done, and therefore they have the better equity.

Younger, K.C., in reply :

Mrs. Russell's name ought never to have been entered on the register, and was properly struck out: *Hartley's Case* [1875] (8). She never was legal owner of the shares. There was no negligence on the part of the plaintiffs in not obtaining the certificates, since they asked for them. As to *distringas*, the only effect of proceeding under Order XLVI. would have been to cause the company to refuse to register the transfer; but that is exactly what the company did.

(4) 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597.

(5) [1898] 1 Ch. 315; 67 L. J. Ch. 169; 78 L. T. 109; 46 W. R. 248.

(6) 40 Ch. D. 182; 58 L. J. Ch. 238; 60 L. T. 669; 37 W. R. 318.

(7) 2 Drew. 73; 23 L. J. Ch. 289; 2 Eq. Rep. 341; 2 W. R. 139.

(8) L. R. 10 Ch. 157; 44 L. J. Ch. 240; 32 L. T. 106; 23 W. R. 203.

Therefore the result would have been *nil*. The cases on negligence cited by defendants' counsel do not apply, as there was no such negligence in the present case.

Clauson, for the Randfontein Co.

Cur. adv. vult.

February 20.

JOCHE, J.: This is an action to determine who is entitled to forty shares in the Randfontein Estates Co. and forty shares in the Oceana Minerals Co., all fully paid up. On 24 October, 1904, an indenture was executed by Clayton, the owner of the shares, purporting to be an assignment of all his property to the plaintiffs for the benefit of his creditors. This deed was duly registered under the Deeds of Arrangement Act, 1887, on 7 November. The debtor's affairs were looked into, and it appeared by his books that he was possessed of the shares in question. The certificates were at once demanded from him by the plaintiffs, or their authorised clerk, and the excuse was given that they were in South Africa. On the next day, 8 November, notice was given to both companies that Clayton had executed a deed of assignment in favour of the plaintiffs, and asking the companies to make a note of the deed in their respective registers. On 10 November Clayton called on Messrs. Cohen, his stockbrokers, and instructed them to sell the shares, and they accordingly sold them in the ordinary way on that day. On the 16th he brought the certificates to the brokers and executed a transfer in blank, receiving 25*l.* in advance on account. On 30 November the brokers lodged the certificates with the companies, and got them noted or indorsed with a statement that they had been lodged; but what the exact words of the certification were does not appear. On 7 December the transfers were handed to the purchaser's brokers, who paid the purchase-money to Messrs. Cohen, and they on the same day settled with Clayton, handing him the balance of the proceeds of the shares.

In the case of the Randfontein shares the transfer executed by Clayton was taken by the purchaser's brokers to the company for registration, which was refused because they had received the notice of 8 November, and the company's secretary communicated with the plaintiffs. The purchaser's brokers thereupon demanded

other shares from Messrs. Cohen, which they purchased and delivered in substitution for those originally sold, and which still remained registered in Clayton's name. Messrs. Cohen then applied to Clayton for repayment of the amount which he had received, but without success. Now, as I understand the law, where there are several claimants to shares registered in the name of a third person, the equitable title which is prior in time prevails, unless the claimant under a subsequent equitable title proves that, as between him and the company, he had acquired an absolute and unconditional right to be registered as the owner of the shares before the company received notice of the other claim. In my opinion, therefore, the plaintiffs are entitled to these forty shares in the Randfontein Co. But Messrs. Cohen claim a lien upon them. If they have any lien, however, it is only equitable, and can only be upon Clayton's interest, which is subject to the right of the plaintiffs under the deed of assignment. Then it is said that the plaintiffs have disentitled themselves by negligence. I see no negligence on the part of the plaintiffs, unless it be, as Messrs. Cohen allege, in not adopting the procedure now substituted by Order XLVI. rule 4 for the old procedure by *distringas*. I cannot accede to the contention that by omitting to adopt this course the plaintiffs must be postponed. If they had proceeded by *distringas* the result would have been just the same. It would only have prevented the company from registering the transfer to the purchaser, which in fact they did refuse to do by reason of the notice given to them on 8 November by the plaintiffs. It is suggested, but not seriously contended, and at all events there is no evidence to prove, that the *distringas* would have prevented what is called the certification or the noting on the back of the transfer that the certificates had been lodged. As I understand that note, it only amounts to a representation that a document has been lodged with the company, apparently in order, and showing *prima facie* that the transferor is entitled to the shares; but it is no warranty of the transferor's title to the shares or as to the validity of any of the documents. Messrs. Cohen never inquired of the company whether there was any *distringas* or other stop order against the registration of the shares. So much for the Randfontein shares.

As to the Oceana shares, the case is practically the same, the

only difference being that, on referring to the register of members of that company—and there is no other evidence upon the subject—it seems that the transfer from Clayton of the forty shares, which was, in fact, to a Mrs. Russell, was in the first instance entered upon the register, though under what circumstances, or whether by any express authority of the board, does not appear. At all events, no such registration ought to have been made, having regard to the notice the company had received on 8 November, without previous communication with the giver of that notice. Mrs. Russell, however, was not able to get from the company any certificate for the shares, and her brokers applied to Messrs. Cohen and demanded other forty shares, which were at once provided. The transfer of these shares, registered and certificated, was issued in due course, and the registration of the former transfer from Clayton to Mrs. Russell cancelled, or not proceeded with, no doubt with Messrs. Cohen's concurrence, so that in the result the shares are in the name of Clayton still. They are not in the name of Messrs. Cohen, who had no transfer from Mrs. Russell. It was contended that the true view is that Mrs. Russell still remains on the register as the owner of these forty shares sold to her brokers by Messrs. Cohen on Clayton's behalf, and that Messrs. Cohen have a lien on them. Mrs. Russell does not claim the shares, and she is not made a party to the action. I do not think that she has any such legal interest as contended. At all events, Messrs. Cohen's interest, if any, is equitable only. In my view, they had no present, absolute, and unconditional right to be registered as owners of those shares before the company had notice of the claim of the plaintiffs, or indeed at any time. As in the case of the Randfontein shares, so in the case of the Oceana shares, I am of opinion that Messrs. Cohen's lien, if any, is only upon Clayton's interest, which is subject to the prior equitable rights of the plaintiffs. When Mrs. Russell applied for registration the money received by Messrs. Cohen on the sale had gone to Clayton. A *distringas* would not have prevented its payment, although it would have prevented any registration of Mrs. Russell's transfer, and Messrs. Cohen would be, if possible, in a worse position than they are now. In the case of the Oceana shares, as well as in the case of the Randfontein shares, a *distringas* would not have saved Messrs.

Cohen from the loss they sustained by trusting Clayton and, upon his instructions, proceeding to sell without first ascertaining that there was no stop or impediment to the registration of the transfer of the shares. But I must not be understood to say that it is usual to do that. What I have already said with reference to certification and the absence of negligence on the part of the plaintiffs applies to the case of the Oceana shares just as much as to the Randfontein shares.

The result is that the plaintiffs are entitled to succeed in their action, and there will be a declaration that they are entitled to the shares.

Solicitors : *Andrew, Wood, Purves & Sutton*, agents for *J. Hewitt, Barnsley*, for Plaintiffs.
Cohen & Cohen, for Messrs. Cohen.
Linklater, Addison, Brown & Jones, for Randfontein Co.

IN RE AFRICAN FARMS, LIMITED.

1906, March 18, 20. WARRINGTON, J.

Company — Winding-up — Petition — Affidavit verifying Petition — Affidavit by Agent of Petitioner — Sufficiency — Companies (Winding-up) Rules, 1903, r. 29.

Notwithstanding that rule 29 of the Companies (Winding-up) Rules, 1903, requires a petition for the winding-up of a company to be verified by an affidavit "made by the petitioner," the Court will in a proper case accept as sufficient an affidavit other than that of the petitioner.

Thus, where the petitioner was resident in South Africa, the Court accepted the affidavit of his attorney and agent, who knew the facts on which the petition was based, whereas the petitioner did not.

In re Charterland Stores and Trading Co. (1) not followed.

PETITION for an order to wind up the above-named company.

The petitioner had recovered judgment against the company for 81*l. 6s. 8d.*, arrears of salary due to him for services rendered by him as their assistant manager at a farm at Fort Klipdam, Pietersburg, South Africa, the judgment being still unsatisfied.

The petition was verified by an affidavit by Arthur Walter (1) 8 *Manson*, 94; [1900] 2 *Ch.* 870; 69 *L. J. Ch.* 861; 83 *L. T.* 674; 49 *W. R.* 75.

Ramsey, as attorney and agent of the petitioner, the deponent knowing the facts upon which the petition was founded, whereas the petitioner, who was resident in South Africa, did not.

J. M. Gover, for the petition.

A. F. Peterson:

There is a preliminary objection to the petition on the ground that it is not verified by an affidavit made by the petitioner, as required by rule 29 of the Companies (Winding-up) Rules, 1903 (2). In *In re Charterland Stores and Trading Co.* [1900] (1), WRIGHT, J., held that an affidavit by a petitioner's manager was not sufficient, and that non-compliance with the rule by filing only an affidavit by a person not by the rule authorised to make the affidavit could not be waived by the Court as a "formal defect" or an "irregularity" within the meaning of rule 200 (1) (rule 177 of the Rules of 1890).

[He mentioned *In re Carrara Marble Co.* [1896] (3).]

J. M. Gover, in reply:

The affidavit is sufficient. This case is exactly parallel with *In re Carrara Marble Co.* (3). The attorney has more knowledge of the facts than the client himself could have.

[WARRINGTON, J.: The present Winding-up Rules are subsequent to Mr. Justice WRIGHT's decision, and yet no modification of rule 177 of 1890 was made in rule 200 of 1903.]

[*In re Brandy Distillers' Co.* [1901] (4) and *In re Fortune Copper Mining Co. of Western Australia* [1870] (5) were also mentioned.]

(2) Rule 29 of the Companies (Winding-up) Rules, 1903: "Every petition for the winding-up of a company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the

petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition."

(3) W. N. (1896), 87; 31 L. J. N. C. 497.

(4) 17 T. L. R. 272.

(5) L. R. 10 Eq. 390; 39 L. J. Ch. 677; 22 L. T. 650.

WARRINGTON, J.: The question which I have to determine depends upon rule 29 of the Companies (Winding-up) Rules, 1908. The objection has been taken that an affidavit by the attorney for and instead of the client, who is himself resident in South Africa, is not sufficient to satisfy the rule. It is plain that the attorney knows the facts upon which the petition is based, whereas the client does not. The attorney's affidavit, therefore, is worth more than the client's would be. I should have no hesitation in accepting the attorney's affidavit were it not for the decision of Mr. Justice WRIGHT in *In re Charterland Stores and Trading Co.* (1), where an objection similar to that which is raised in the present case was taken, and Mr. Justice WRIGHT refused to accept the affidavit of the petitioner's manager, and said he considered he had no power to dispense with a strict compliance with the rule. I have looked into the practice; indeed, I have ascertained that there have been a number of cases, some of which are unreported, in which an affidavit other than that of the petitioner himself has been accepted as sufficient compliance with the rule. I have also spoken on the subject to Mr. Justice BUCKLEY, to whom company matters have been assigned, and he has pointed out to me—and I desire now to point out—that rule 29 does not state what shall be the effect of the petition being verified by an affidavit different from that specified in the rule; it does not say that the petition shall fail, but it is merely directory that a particular affidavit shall be used. So that leaves it open to the Court to accept in a proper case such an affidavit as in an ordinary case coming before the Court would be accepted in practice as sufficient evidence of the facts in issue. I have already said that the attorney's affidavit is of more value than the client's; and accordingly, upon the principle I have mentioned, I am prepared to accept it as *prima facie* evidence of the truth of the facts stated in the petition. I therefore overrule the preliminary objection.

Solicitors: *F. Kimber Bull & Duncan*, for Petitioner.

Whitehouse & Co., for Company.

BISGOOD v. NILE VALLEY CO.

1906, February 22. KEKEWICH, J.

Company—Memorandum of Association—Reconstruction—Sale to New Company—Shares of Dissentient Shareholders—Return of Rateable Proportion of Proceeds of Sale—Forfeiture—Ultra Vires—Injunction—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.

A company which had power under its memorandum of association to sell its undertaking for shares of any other company having objects altogether or in part similar, before going into liquidation, passed a resolution approving a draft agreement for a sale of its undertaking to a new company for the same number of shares as those issued in the old company, but subject to a liability per share. A clause of the agreement provided that within a fixed time after the winding-up the liquidator should require members to claim for allotment in the new company within a specified time, and as regards such shares as were not claimed accordingly should "use his best endeavours to sell the same for what they would fetch," the proceeds of sale, after paying expenses, to be "distributed rateably among the members who, if they had claimed, would have been entitled to such shares in accordance with their rights and interests":—

Held, that the proposed scheme was not justified by the memorandum of association, and was *ultra vires*, as it constituted such a forfeiture of the shares of dissentient members in a going concern as was not contemplated in their contract with the company, and none the less because there was a provision for a rateable distribution of the proceeds of sale by the liquidator.

Manners v. St. David's Gold and Copper Mines (1) followed.

MOTION.

The defendant company, originally called the Nile Valley (New) Co., Limited, but since 1904 called the Nile Valley Co., Limited, was incorporated under the Companies Acts, 1862 to 1900, on 6 April, 1903, with a nominal capital of 250,000*l.*, divided into 250,000 shares of 1*l.* each, of which 218,257 had been issued and were fully paid.

The principal objects of the company, as stated in the memorandum of association, were to acquire certain mining concessions in Egypt and to carry on the business of a mining company in all its branches. Among the other objects of the company therein defined were the following:

"(10) To sell, let, dispose of, or deal with the undertaking of the company, or any part thereof, for such consideration as the

(1) 11 Manson, 425; [1904] 2 Ch. 593; 73 L. J. Ch. 764; 91 L. T. 277; 20 T. L. R. 729.

company may think fit, and in particular for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company. To distribute any of the property of the company among the members in specie."

"(15) To sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with, all or any part of the property and rights of the company."

"(20) To distribute among the members in specie by way of dividend or bonus, or upon a return of capital, any property of the company or any proceeds of sale or disposal of any property of the company, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law."

On 3 February, 1906, a circular was issued to the shareholders of the company, in whom the plaintiffs Bisgood and O'Connor were included as holding twenty shares, stating that the directors, having found the funds in hand not sufficient to enable the company to bring its operations to a successful issue, had decided to authorise the sale of the undertaking and assets to a new company upon the terms of a draft agreement, the heads of which were shortly stated in the circular. The main feature of the scheme of reconstruction was that the assets and undertaking of the old company were to be sold to the new company for the same number of 1*l.* shares as those issued in the old company, but subject to a liability of 4*s.* per share.

The draft agreement was expressed to be made between the Nile Valley Co. (hereinafter called the old company) of the one part and the Nile Valley (New) Co. (hereinafter called the new company) of the other part. The material clauses were as follows:

"(1) The old company shall sell and the new company shall purchase as on the 1st day of January 1906 all and singular the leases concessions lands and buildings plant machinery ore gold goods chattels moneys credits shares debts bills notes and things in action of the old company and the undertaking and business thereof with the full benefit of all contracts and agreements and of all securities in respect of the said things in action to which the old company is entitled and all other the real and personal property of the old company whatsoever and wheresoever.

“(2) As a part of the consideration for the said sale the new company shall undertake pay satisfy and discharge all the debts liabilities and obligations of the old company whatsoever and shall adopt perform and fulfil all contracts and engagements now binding on it and shall at all times keep the old company and in the event of the old company going into liquidation its liquidators and contributories indemnified against such debts liabilities obligations contracts and engagements and against all actions proceedings costs damages claims and demands in respect thereof and shall pay all expenditure of the old company subsequent to the 1st day of January 1906.

“(3) As a further part of the consideration for the said sale if the old company shall go into liquidation within six calendar months from the date hereof the new company shall pay and at all times hereafter keep the old company its liquidators and contributories indemnified against all the costs and expenses of and incident to the winding up of the old company and of carrying the said sale into effect.

“(4) As further part of the said consideration for the said sale the old company or its liquidator shall have the right to subscribe at par for all or any of 31,743 unissued shares of the new company at any time or times during one year from the date of this agreement.

“(5) As the residue of the consideration the new company shall allot and issue to the old company or its nominees 218,257 shares in the new company of 1*l.* each with the sum of 16*s.* credited as having been paid up thereon to be numbered 1 to 218,257 both inclusive.”

By clause 6 it was provided that, in the event of the old company going into liquidation before the 218,257 shares should have been allotted to the old company or its nominees, every member of the old company should be entitled as of right to claim an allotment to himself of one 1*l.* share in the new company, with 16*s.* credited as having been paid thereon; and, further, that within fourteen days of the commencement of the winding-up the liquidator should give notice in manner therein mentioned to the members stating the time within which the claim for allotment must be sent in to the new company; and, further, that a registered member must claim

within fourteen days from the date of the notice, and a bearer member within a month of the first advertisement of the notice as therein mentioned, or within such extended time as might be fixed by the liquidator. Two sub-clauses of this clause were as follows:

"(d) As regards that proportion of the said shares in the new company which members of the old company shall be entitled to claim as aforesaid but shall not within the periods of fourteen days or one calendar month or within such extended time as aforesaid claim the said liquidator shall use his best endeavours to sell the same for what they will fetch and the proceeds of sale thereof after paying all expenses of and incident to the sale shall be distributed rateably among the members who if they had claimed would have been entitled to such shares in accordance with their rights and interests and in substitution for such shares the new company shall upon the request of the said liquidator allot to such purchasers the shares sold to them respectively credited as aforesaid but such request to be effective must be made within three months from the date of the liquidation or such later date as may be agreed upon by the new company.

"(e) Any such sale as aforesaid may be made by the said liquidator either by public auction or private contract and either together or in lots and either with or without reserve and subject to any special or other conditions with power to sell parts thereof with calls of additional shares and with power to buy in and resell and generally upon such terms and conditions and in such manner as the said liquidator shall in his absolute discretion think fit."

On 12 February, 1906, at an extraordinary meeting of the company, a resolution approving this agreement was passed by the shareholders.

The plaintiffs thereupon on the same day issued the writ in this action claiming a declaration that the resolution was *ultra vires* of the defendant company, and an injunction to restrain the company, its directors, officers, and agents, from acting upon it and from carrying into effect any agreement on the terms and in the form of the draft agreement, and served it on the company with notice of motion for the injunction as asked.

On 14 February, 1906, a notice of a meeting to pass a resolution for the winding-up of the company was issued to the shareholders,

but this meeting had not been held when this motion was made to the Court.

P. O. Lawrence, K.C. (Beebee with him), for the plaintiffs :

The proposed scheme is *ultra vires*, for the selling company has no power to contract that upon a liquidation the liquidator should sell the shares of shareholders dissatisfied with the proposed arrangement for what they will fetch, and distribute the proceeds as proposed : *Manners v. St. David's Gold and Copper Mines, Limited* [1904] (1). It makes no difference that here the option is to the company only, while there the rescission clause was a mutual one. The Court of Appeal described the schemes broadly as devices to make shareholders contribute further capital or lose their money in the company as a going concern, and said that they were *ultra vires* and improper. There is no decision that this kind of reconstruction scheme can be carried out under section 161 of the Companies Act, 1862, so as to deprive the dissentient shareholder of his rights. The question did not fall to be decided in *Mason v. Motor Traction Co.* [1905] (2).

Stewart-Smith, K.C. (Shewell Cooper with him), for the defendants :

The agreement is in a form very common in the company world, and the question is an important one. This reconstruction scheme is so framed as to confer as much of equal rights as possible between the shareholders in a speculative concern. A shareholder is invited either to take his share in the new company with a small liability, or to have his rateable proportion of the proceeds of a sale by the liquidator using "his best endeavours." Under section 161 of the Companies Act, 1862, the liquidator has powers of sale : *I'ostlethwaite v. Port Phillip and Colonial Gold-Mining Co.* [1889] (3). The scheme in *Manners v. St. David's Gold and Copper Mines* (1) was a different one, as there the company was to take the money forfeited. The present case is that of a carefully framed working

(2) 12 Manson, 31; [1905] 1 Ch. 419; 74 L. J. Ch. 273; 92 L. T. 234; 21 T. L. R. 238.

(3) 43 Ch. D. 452; 59 L. J. Ch. 201; 62 L. T. 60; 38 W. R. 246; 2 Meg. 10.

commercial scheme, under which in liquidation dissentients like the plaintiffs are entitled to an aliquot portion of the liquidated assets. The terms arranged are beneficial to such holders, who can take their shares "in malt or in meal." If the expression at the end of sub-clause (d) of clause 6 of the agreement is not clear enough or satisfactory to the Court, it can be altered. If, however, the agreement must go altogether, there will then be a sale of the assets under section 161 of the Companies Act, in which the plaintiffs will get less. If the scheme stands, they have the proceeds of sale of shares with a liability, with the benefit of getting a price for them from buyers who have resolved to carry on.

[The defendant company having expressed its intention of carrying out the draft agreement without alteration, unless restrained,]

P. O. Lawrence, K.C., was not called upon to reply.

KEKEWICH, J.: I have no doubt that this agreement cannot stand as it is. I do not propose to go through the whole of it. It is admitted that this is not an agreement intended to be effected under the provisions of the Companies Acts, 1862, ss. 161 and 162. There is to be a winding-up, and the sale of the company's undertaking and assets is to be carried through in that winding-up, and through the machinery of the liquidator, but not under the statutory provisions to which I have referred. Therefore we need not inquire what the statute gives, or whether there is anything different from what the statute gives, because the statute has nothing whatever to do with it. Then there is a liquidation of the company. It is a voluntary liquidation, and the company is still in existence, still carrying on business, and still entitled to sell, if they have any power to sell at all under the memorandum and articles of association, as a going concern.

The first question is, Have they power to sell? That is easily answered. Under sections 10 and 15 of the memorandum of association there is power to sell not only "the undertaking"—which is all that is covered by section 10—but also "all or any part of the property and rights of the company." They might sell "the undertaking," or they might sell the whole or any part of the assets as a going concern; and they may sell that, according to

section 10, at any rate, "for shares." They may sell the undertaking for shares; and I will assume, though it is not expressed, that they may sell any part of the property for shares. That is not expressed, and there may be a small point upon that, but they may sell their "undertaking" for shares, and the expression, "the undertaking," would cover a great deal. If they may sell for shares, they may sell for partly paid-up shares—shares which are not wholly paid up—in some other company. So far there is no difficulty. To work it out properly, all the shares would be under the control of the liquidator, or, if there were no liquidator, under the control of the directors, in which case they would have to realise those shares as part of the assets of the company, and after paying the costs and expenses, and of course clearing the company from debts, they would have to divide those proceeds among all their shareholders in proportion to their nominal interests in the company. Of course a question might arise where shareholders had not paid calls, and so on, and the partnership rules would come in; but, substantially, in a case of this kind, where they are all fully paid up, it would be in proportion to their nominal interest in the company. That would be the proper mode of proceeding. Here, however, it is not proposed to follow that course. They propose to allot the shares in the new company direct to the shareholders in the old company. I am not sure that they have the right to do anything of the kind. The shares in the new company are intended to be partly paid-up shares; and I do not see how this old company, or the liquidator, can compel a shareholder in the old company to take shares in the new company, one or more, whether it is the rateable proportion or any other number, imposing thereby a liability. That is a difficulty in the way of the scheme.

That having been foreseen, it is attempted to get over it. Those shareholders, who are willing to accept partially paid-up shares and the liability, are to have their shares. Then comes the difficulty: What are you to do with those who will not? You cannot force upon them anything at all. They are entitled to their share in the assets of the company, including, of course, as it is a winding-up, their share in their proper proportion of the proceeds of sale of those shares which are allotted to the consenting shareholders.

But it is not proposed to give them anything of that kind. It is proposed, as they are—without using the word in an offensive sense—obstinate and refuse to take any allotment, that they shall have something else. Now what is that something else to be? Those shares which are not taken are to be sold by the liquidator for what he can get for them. There is a certain time limit fixed within which the obstinate refusal is to be expressed. There is a certain time within which the liquidator is to sell. As at present advised, I see no objection to a reasonable time limit in either case, and I see no reason for supposing that the time limit fixed is not undoubtedly reasonable in either case. But he is to sell—not necessarily, of course, all at once, because probably that would be impossible—but he is to sell when and as he can. If eventually he sells "for an old song," as the saying is, then "for an old song" the shares must go. He has got to realise; and when he has got in all—or of course, if he prefers, when he has got a substantial sum in hand—he is to distribute it, of course after paying the expenses of the sale. That means, as I understand it, the sale of all those shares which he has sold up to the time of distribution, and if there is no distribution, then undoubtedly all of them that have been realised. What remains in his hands is to be distributed among those dissenting members who have not come in, or, as I have called them, the obstinate, refusing members. They are to have a share in this fund, be it small or be it large.

Now I confess that I cannot follow the meaning of the language in which the rateable distribution is expressed. I am told that it is perfectly clear, and that it only means that all the rights and interests of the shareholders are to be taken into consideration at the time of the distribution. I do not understand what rights and interests have to be taken into consideration. How can there be anything open for discretion? "Rateably" implies that there is some proportion which has to be ascertained; and the proportion, it seems to me, must necessarily be the value that the interest of the particular shareholder receiving his quota bears to the total interest of those who have stood out. I do not think there is any other right or interest to be considered. "Rateably" seems to me necessarily to imply that. Therefore each shareholder in each distribution (and there may be only one distribution) will get his

share with the others—his proportion of the proceeds of sale—less expenses. That may be extremely unfair to a shareholder. His shares may have been sold at a good price on the market; there may have been a slump, and the rest of the shares may have been sold, as I said before, “for an old song.” Then those whose shares were sold for “an old song” will have their proportion calculated exactly in the same way as his, though his shares, possibly, were sold for a larger sum. That seems to me to be unfair, and to work injustice. But, apart from that, is this fair to these dissenting shareholders at all? It seems to me that it is (to use a common expression) putting a pistol to their heads and telling them, “If you do not come in, all you will get is your proportion, whatever it may be, of the sale of those shares which are held by dissentient shareholders; if you do come in, you will have to accept shares with a liability, and if you will not take that—and we admit, and must admit, that we cannot force you to take that—then you will have what you can get in that way, which may be a very small amount—you will have nothing whatever to do with the new company—you will have nothing to do with shares in the new company, of course, because you said you will stand out—all you get is your rateable proportion, ascertained in that way.” That seems to me to be unfair.

I do not propose to go into the rest of the agreement, because I think it all turns on that, as on a hinge. I think it comes precisely within what Lord Justice ROMER describes in the case of *Manners v. St. David's Gold and Copper Mines, Limited* (1), where he says, “It is a scheme whereby the shareholders of a company who have paid up their shares in full and are not under any liability to furnish any further capital have said to them this: ‘You must pay up more capital, and if you do not you shall forfeit all share and interest in this company as a going concern.’” The distinction between that case and this is obvious, and, of course, has been relied upon. There the dissenting shareholders would get nothing. The proceeds of sale of their shares were to go to the company, to go away from them altogether.

Lord Justice ROMER’s observations, and the observations to be found in the other judgments, are of course relied upon here. There is this difference in substance: that here the shareholder

is to get his rateable proportion. It seems to me to come to the same thing: "You are under no liability, we cannot force you to come under liability, but we can force you, and will force you, to forfeit your shares." Whether you forfeit them by taking them all away, or forfeit them by dealing with them in a way that is not sanctioned by any contract between the parties, and not even justified by any passage in the memorandum and articles of association, seems to me to be perfectly immaterial. You take away from the shareholders that which is their own. You say to them, "If you do not come in, at any rate you shall not have your shares; you shall have something else," which I do not think will be ascertained fairly, but whether it is ascertained fairly or not, it is not in the bond.

I think the shareholders are entitled to insist on the bond, and therefore I propose to restrain the company from proceeding on the agreement in its present shape. How far alterations will modify all difficulties is another matter; but I do not think the agreement can stand as it is.

There will therefore be an injunction to restrain the defendants from carrying out the draft agreement in its present form. I do not say whether they can or cannot modify it without a further resolution; but the injunction will go to the agreement as it stands.

Solicitors: *Bisgood & Marshall*, for Plaintiffs.

Worthington Evans, Dauney & Co., for Company.

FULLER v. WHITE FEATHER REWARD, LIMITED.

1906, March 23, 27. WARRINGTON, J.

Company—Reconstruction—Winding-up—Memorandum—Sale of Assets for Partly Paid Shares—Distribution among Shareholders—Option to Accept Shares—Shares not Accepted to be Sold and Proceeds Distributed—Equality—Ultra Vires.

A company was incorporated with a capital of 140,000*l.* in 1*l.* shares, which were issued and fully paid. The memorandum of association provided that the objects of the company were, *inter alia*, "to sell . . . the undertaking . . . of the company . . . for such consideration as the company may think fit, and in particular for any shares, fully or partly paid up, . . . of any other company, and to divide such part or parts, as may be determined by the company, of the purchase-money, whether in cash, shares, or other equivalent, . . . amongst the members of the company, by way of dividend or bonus in proportion to their shares, . . . and the powers contained in this . . . sub-section shall be exercisable whether in view of a winding-up of the company or not"; and "to distribute any of the assets of the company amongst the members in specie, or otherwise. . . ." The company agreed to sell their undertaking to another company in consideration—first, of payment of debts and liabilities; secondly, of payment of costs of winding-up if resolved upon within six months; and thirdly, of 140,000 shares of 5*s.* each of the purchasing company credited with 3*s.* 6*d.* paid up, the vendor company or its nominees within a limited time to apply for and accept an allotment of the shares, and, in default, the shares unapplied for to be at the disposal of the purchasing company. Subsequently resolutions were passed for voluntarily winding up the vendor company and authorising the liquidator to offer the shares of the new company receivable under the agreement for distribution amongst the members of the old company at the rate of one new share for each old share, and in the event of any members not accepting their due proportion of shares within a limited time the liquidator was to use his best endeavours to sell the shares not accepted upon the best terms obtainable, and to hold the proceeds upon trust for distribution among the non-accepting members:—

Held, that the agreement and proposed distribution of shares were not *ultra vires*.

Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited (1), followed.

Manners v. St. David's Gold and Copper Mines, Limited (2), and *Bisgood v. Nile Valley Co.* (3), distinguished.

MOTION.

The White Feather Reward, Limited, was incorporated as a joint-stock company in 1900 under the Companies Acts, with a

(1) 7 Manson, 85; [1899] 2 Ch. 616; 68 L. J. Ch. 692; 81 L. T. 29; 48 W. R. 1.

(2) 11 Manson, 425; [1904] 2 Ch. 593; 73 L. J. Ch. 784; 91 L. T. 277; 20 T. L. R. 729.

(3) *Ante*, p. 126.

capital of 140,000*l.*, divided into 140,000 shares of 1*l.* each, all of which were issued and at the time of the transactions in question were fully paid up.

The memorandum of association contained, among the objects for which the company was established, the following: "(w) To sell, lease, exchange, surrender, improve, manage, develop, mortgage, dispose of, turn to account, or otherwise deal with the undertaking and property and rights of the company or any part thereof for such consideration as the company may think fit, and in particular for any shares, fully or partly paid up, debentures, fully or partly paid up, or securities, fully or partly paid up, or property of any other company, and to divide such part or parts, as may be determined by the company, of the purchase-money, whether in cash, shares, or other equivalent, which may at any time be received by the company on a sale of, or other dealing with, the whole or part of the property, estate, effects, and rights of the company, amongst the members of the company, by way of dividend or bonus in proportion to their shares, or to the amount paid up on their shares, or otherwise to deal with the same, as the company may determine. And the powers contained in this and the preceding sub-section (v) shall be exercisable whether in view of a winding-up of the company or not. . . . (x) To distribute any of the assets of the company among the members in specie, or otherwise, but so that no distribution amounting to a reduction of capital be made without the sanction of the Court where necessary." Article 179 of the articles of association was as follows: "The liquidator, on any winding-up (whether voluntary, under supervision, or compulsory), may, with the sanction of an extraordinary resolution, divide among the contributories in specie the whole or any part of the assets of the company, and may, with the like sanction, vest the whole or any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidator, with the like sanction, shall think fit."

By an agreement made 22 January, 1906, between White Feather Reward, Limited (therein called the vendor company), and White Feather Main Reefs (1906), Limited (therein called the purchasing company), after reciting that the whole of the shares of the vendor company had been issued, and that the purchasing company had

been formed with a capital of 75,000*l.*, divided into 300,000 shares of 5*s.* each, to acquire the property of the vendor company, it was agreed—first, that the vendor company should sell, and the purchasing company should purchase, all the undertaking, business, lands, mines, mineral rights, and other property and effects of the vendor company, and all machinery, plant, money, debts, goodwill, things in action, the benefit of all agreements, and all its other assets; secondly, as part of the consideration the purchasing company should satisfy and discharge the existing debts, liabilities, and obligations of the vendor company, and should perform and fulfil all its pending and uncompleted contracts and engagements; thirdly, as further consideration the purchasing company should, if the vendor company within six months passed an effective resolution for a voluntary winding-up, pay all the costs of the winding-up and dissolution of the vendor company; fourthly, as further consideration the purchasing company should allot to the vendor company, or at the vendor's option to its nominees, 140,000 shares of 5*s.* each in the capital of the purchasing company credited with 3*s.* 6*d.* per share as paid up thereon; fifthly, the vendor company should apply or find substantial nominees who would within two months after the date thereof, or within such extended time as might be agreed between the parties thereto, apply for and accept an allotment of the shares, and pay 6*d.* per share on application, and agree to pay 6*d.* per share on 30 April, and the remaining 6*d.* per share on 30 June, shareholders in the vendor company to be considered substantial for the purpose of that clause; and sixthly, in the event of the vendor company failing to comply with the conditions of the last preceding clause with regard to any of such shares so to be applied for (for which purpose time should be of the essence of the contract), the shares unapplied for by the vendor company, or in respect of which substantial nominees should not have been found who should have applied for and accepted an allotment as aforesaid, should be at the disposal of the purchasing company, and the vendor company should not be under any liability to become a member of the purchasing company in respect of any of the said shares.

Contemporaneously with the agreement, the directors issued a report stating that negotiations had been for some time going on and

had resulted in an agreement for amalgamation with the White Feather Main Reefs, Limited, and that in order to provide funds for further development, and with a view to economical working, it would be necessary to ask the shareholders to agree to an assessment of 1*s.* 6*d.* on both companies' shares, and that it was now proposed to register a new company with a capital of 75,000*l.* in 300,000 5*s.* shares (in place of 1*l.* shares, as at present), credited with 3*s.* 6*d.* paid, of which 140,000 were allocated for shareholders in White Feather Reward, Limited, and 160,000 for shareholders in White Feather Main Reefs, Limited, those figures representing the number of shares issued in both companies. At the same time with the report the directors gave notice dated 23 January, 1906, that a meeting of the company would be held on 31 January, at which the meeting would be asked to consider an amalgamation scheme and, if thought fit, to pass certain resolutions. The proposed resolutions were as follows: first, "That the amalgamation scheme submitted to this meeting be and the same is hereby approved"; secondly, "That it is desirable to wind up this company, and accordingly that the White Feather Reward, Limited, be wound up voluntarily"; thirdly, "That the liquidator of the company be and is hereby, as and from the date of his appointment, authorised and required to offer the shares of the new company of 5*s.* each (credited with 3*s.* 6*d.* as paid up thereon) receivable under the agreement for sale referred to in the amalgamation scheme for distribution among the members of the company, at the rate of one of such new shares for each share in the existing company held by such members"; fourthly, "That in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not being less than fourteen days) the liquidator be authorised and required to use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and to hold the net proceeds of such sale upon trust to distribute the same among such members." The notice further stated that resolutions 3 and 4 would be submitted as extraordinary resolutions, and resolution 2, if passed, would be submitted for confirmation as a special resolution at a subsequent meeting. On 31 January the resolutions were duly passed, and resolution 2 was subsequently duly confirmed.

The amalgamation scheme stated: “(1) A new company called the White Feather Main Reefs (1906), Limited, has been formed and registered, and will have a capital of 75,000*l.*, divided into 300,000 shares of 5*s.* each; (2) the new company purchases from the present company and the White Feather Main Reefs, Limited, their respective undertakings and assets for a consideration consisting of—(a) 299,998 shares of 5*s.* each, of which 140,000 are allocated to the White Feather Reward, Limited, and 159,993 to the White Feather Main Reefs, Limited; the said shares are credited as being paid up to the extent of 3*s.* 6*d.* per share, and have a liability of 1*s.* 6*d.* per share, payable 6*d.* on application, 6*d.* on 30 April, 1906, and 6*d.* on 30 June, 1906; and (b) the payment and satisfaction of the debts and liabilities of the companies, including the cost of liquidation; (3) the present companies to go into voluntary liquidation, and the liquidator to offer the shares in the new company (credited with 3*s.* 6*d.* per share as paid up thereon), receivable as above, for distribution among the members of the respective companies, at the rate of one of such new shares for each share in the existing companies held by such members; (4) in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not being less than fourteen days), the liquidator shall use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and shall distribute the net proceeds of such sale among such members.”

On 18 March the plaintiff, who held fully paid shares in the White Feather Reward, Limited, commenced this action against the company and the liquidator of the company, claiming—first, a declaration that the agreement of 22 January, 1906, and the distribution of shares in the White Feather Main Reefs (1906), Limited, part of the purchase consideration, in accordance with the agreement or in accordance with the resolutions of 31 January, were *ultra vires* the defendant company; and secondly, an injunction to restrain the defendants from carrying out the agreement and from foregoing any of the shares in the purchasing company according to the provisions of the agreement, or from disposing of any of the unclaimed shares in manner provided for by the fourth resolution, or otherwise from dealing with any of the shares in the White Feather Main Reefs (1906), Limited, part of the

consideration for the acquisition of the defendant company's assets by the last-mentioned company, otherwise than in accordance with the rights of the members of the defendant company.

The present application was a motion that the defendants might be restrained, until trial of the action or further order, from carrying into effect the agreement, or, in the alternative, from distributing 140,000 shares of 5*s.* each with 3*s.* 6*d.* paid in the capital of the White Feather Main Reefs (1906), Limited, in accordance with the provisions of that agreement, or from selling any of the shares not applied for by members of the defendant company in manner provided for by resolution 4, or from disposing of the shares or any of them otherwise than in accordance with the rights of the members of the defendant company.

Care, K.C., and Martelli, for the plaintiff:

Manners v. St. David's Gold and Copper Mines, Limited [1904] (2), is directly in point, and governs the case. It must be admitted that section 161 of the Companies Act, 1862, does not apply to this case, and there is no issue of fact. There is no equal or rateable distribution among the members of the old company: *Bisgood v. Nile Valley Co.* [1906] (3).

H. Terrell, K.C., Gore-Browne, K.C., and Cozens-Hardy, for the defendants:

The plaintiff's notice of motion claims two things: that the agreement of sale is *ultra vires* and that the fourth resolution is also *ultra vires*. The company have power in the widest terms under the memorandum of association to sell their undertaking and property. They could have sold to anyone who was willing to take over and pay their liabilities. In the sale they have made they have not only got their liabilities taken over, but also a right to have allotted to the company or their nominees a number of shares partly paid. The shares to be allotted may be worth something or may not, but there is nothing *ultra vires* in the transaction. If the shares are of value, the company get them, and they form part of their assets; if they are not of value, the company need not take them; but in either case the company get their consideration for the sale. The case is wholly governed by *Burdett-Coutts v. True Blue*

(*Hannan's*) *Gold Mine, Limited* [1899] (1). That was a case under section 161, and is therefore much stronger than this. There is no difference between a shareholder who is bound by a resolution under the terms of the memorandum, as here, and a shareholder who is bound by a resolution adopting a scheme of reconstruction under section 161. *Bisgood v. Nile Valley Co.* (3) is distinguishable from *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited* (1), because there was an inequality.

[WARRINGTON, J.: Except for section 161, a company cannot sell for benefits to the shareholders, but only for benefits to the company.]

The plaintiff's objections are really two and not one : to the agreement for sale and to the scheme of distribution of the shares, which are quite distinct.

[WARRINGTON, J.: It seems to me they are one and the same.]

Doughty v. Lomagunda Reefs, Limited [1902] (4), was, like the present case, not under section 161, and is indistinguishable from this case. The agreement here is absolute, not conditional. There, as here, it was said it was an attempt to get out of section 161. With the one distinction that the shares there were fully paid, that case governs this.

[WARRINGTON, J.: That difference was the whole point.]

BUCKLEY, J., has dealt with that difference in *Mason v. Motor Traction Co.* [1905] (5). Here there was an absolute agreement for sale ; and, though it did not contemplate a winding-up, the fact that the resolution was afterwards passed would not, even if the resolution were *ultra vires*, make the agreement void. An agreement is not rendered void even by something within the agreement itself: *Wall v. London and Northern Assets Corporation* [1898] (6); *a fortiori* in a case where, as here, it is something outside, though

(4) 9 Manson, 418; [1902] 2 Ch. 837; 71 L. J. Ch. 888; 51 W. R. 29.

(5) 12 Manson, 31; [1905] 1 Ch. 419; 74 L. J. Ch. 273; 92 L. T. 234; 21 T. L. R. 238.

(6) 6 Manson, 312; [1898] 2 Ch. 469; 67 L. J. Ch. 596; 79 L. T. 249.

contemplated by the agreement, the agreement is not invalidated. Whatever view the Court may take of the scheme of distribution, the agreement for sale, at any rate, is binding.

[WARRINGTON, J.: But the scheme is part of the agreement.]

The agreement is only that the purchasing company will buy. That is not, as against the purchasers, *ultra vires*. They have nothing to do with the distribution. Between 22 January, when the agreement was sealed, and 31 January, when the resolutions were passed, the purchasers could have applied for specific performance of the agreement, and—assuming, for the sake of argument, that the resolutions were *ultra vires*—the vendor company could not afterwards say that, the resolutions being *ultra vires*, the agreement fell through, and they were not bound by it. The two things are distinct. There is really no connection between them. The plaintiff, by a confusion of ideas, has treated them as one. The question is one not of fairness or unfairness, but of legality or illegality. If what is being done here is held to be illegal, there can never be a reconstruction again. It could not have been intended that the old company should retain the partly paid shares. There is nothing in the scheme of distribution which does not give to each member of the old company equality according to his rights. No member is preferred to another. Each member gets the same right.

[WARRINGTON, J.: No; his right is to have the proceeds of the whole lot of shares distributed between the whole lot of members, not that each member or batch of members should be given the proceeds of his or the batch's shares.]

This case is distinguishable from *Bisgood v. Nile Valley Co.* (3). The shares there were identified with particular shareholders, as is plain from the line of argument KEKEWICH, J. was using, where he said it "might be very unfair on some particular shareholder" that each dissentient shareholder should get his proportionate part with the others of the total of the proceeds. Provided each member gets the same here, and there is power to sell, fairness or unfairness does not matter.

[WARRINGTON, J.: Under section 161 the member gets the value of his shares, not the value of what is to be given for them.]

The shareholders here have joined a company one of the terms of the memorandum of which is that the directors may sell for partly paid shares.

[WARRINGTON, J.: Can a company sell, and give to their shareholders the consideration shares partly in specie and partly not?]

Yes, if the shareholders have the option which they will take. That is quite fair and absolute equality. *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited* (1), was a harder case for the shareholders than the present, for the shares went away altogether if they did not elect within a certain time. In *Postlethwaite v. Port Philip and Colonial Gold-Mining Co.* [1889] (7) the resolutions were held not to be *ultra vires*.

[WARRINGTON, J.: It seems to me that the fact of being under section 161, as that case was, makes all the difference. Here, taking the scheme by itself, it is proposed to forfeit the shares. It is true it is proposed to give the shareholders something else, but it is not the shares.]

A single shareholder has not the right to say to the rest of the shareholders, " You shall not take shares in specie, but they shall all be sold, and you shall only get your proportion of the proceeds." Whether he can or not is the question the Court has to decide. Here a shareholder may refuse to take in specie.

[WARRINGTON, J.: Is it not the principle of section 161 that one man may stop the whole scheme?]

Here all the shareholders take in specie, in effect, because everyone has the option if he chooses to take it, and if he does not he takes the value: he can take the shares or the proceeds; and the fact that the option is to be made within a limited time does not vitiate the arrangement. The scheme is really exactly that of

(7) 43 Ch. D. 452; 59 L. J. Ch. 201; 62 L. T. 60; 38 W. R. 246; 2 Meg. 10.

section 161; the shareholders get all they would get under that section. The section has nothing to do with this case except as showing what is fair and reasonable. *Manners v. St. David's Gold and Copper Mines, Limited* (2), is distinguishable, because there the shareholder who declined to take shares got nothing, although there was cash available, but that cash was taken away from him. Here the purchasing company has nothing to do with the scheme. *In re Lake View Extended Gold Mine* [1900] (8) shows what the Court will do in a case of this sort. Here the liquidator is proposing to adjust the rights of the contributories amongst themselves, which is what he is directed to do under section 188, sub-section 10 of the Companies Act, 1862. What is being done is the best that could be done for those who do not take up shares. Nothing *ultra vires* is being done, and no injunction ought to be granted.

[They also referred to *Grant v. Thompson's Patent Gravity Switch-back Railways Co.* [1888] (9), *Cotton v. Imperial and Foreign Investment and Agency Corporation* [1892] (10), and *New Zealand Gold Extraction Co. v. Peacock* [1898] (11). *Kaye v. Croydon Tramways* [1898] (12) was also mentioned.]

Cave, K.C., in reply :

This case, whichever way decided, will affect many schemes. It is an attempt to keep out section 161. The agreement cannot be taken by itself, apart from the resolutions and the report. But, taken by itself, it is not an agreement for sale within the meaning of the memorandum. Under section 161 it is enough to say that the scheme is an arrangement, but here it must be a sale within the meaning of the memorandum. The sale contemplated by the memorandum is one by the company as a going concern.

[*WARRINGTON, J.*: But, it may be, in view of a winding-up.]

No one, looking at this agreement alone, would say it was a sale of the assets of the company. It is an arrangement under which

(8) W. N. (1900), p. 44.

(9) 40 Ch. D. 135; 58 L. J. Ch. 211; 60 L. T. 525; 87 W. R. 312; 1 Meg. 117.

(10) [1892] 3 Ch. 454; 61 L. J. Ch. 684; 67 L. T. 342.

(11) [1894] 1 Q. B. 622; 63 L. J. Q. B. 227; 70 L. T. 110; 9 R. 669.

(12) [1898] 1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237; 46 W. R. 405.

the company is to be amalgamated or reconstructed. It is really an attempt to get fresh capital. It is doing what is usually done under the Companies Arrangement Act or under section 161.

[WARRINGTON, J.: I do not see why it is not a good business arrangement, even if no winding-up were in view.]

It may be that. It suits the purchaser. If the agreement for sale falls, the scheme for distribution goes with it—it is all one. Accepting and not-accepting shareholders ought to be on the same footing. That is the result of all the authorities: *Griffith v. Paget* [1877] (13). Here there is no equality. The not-accepting shareholder gets a share of the proceeds of a forced sale, of a sale within a limited time. That is not equal to what the accepting shareholder gets. The not-accepting shareholder, in effect, loses his share. Again, if some of the shares are not sold within the time, they are forfeited to the purchasing company, and the not-accepting shareholder gets nothing, or less than he is entitled to. This case ought not to be mixed up with cases under section 161. In cases under that section the rights of dissentients are looked after by the section. Here dissentients are not looked after at all. The agreement itself is *ultra vires*, and, even if not, the proposed distribution is contrary to section 161. As to the authorities cited by the defendants, *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited* (1), was a case under section 161, and does not govern this. *In re Lake View Extended Gold Mine* (8) was also under section 161, and no question arose as to the validity of sale. *Doughty v. Lomagunda Reefs, Limited* (4), was a case of fully paid shares, so there would be no liability; and there was no provision of forfeiture, so everybody got his share. *Mason v. Motor Traction Co.* (5) only decides a sale may be for partly paid shares. The plaintiff ought to succeed, or, in any case, pending proceedings the liquidator ought not to distribute.

WARRINGTON, J.: This is a case of considerable general importance, and I am extremely indebted to counsel for the assistance they have given the Court. The question, and the only question, which I have to decide is whether certain arrangements to which I

will refer later are wholly or in part *ultra vires* the defendant company. I desire to say at once that I have not to decide whether the arrangements are fair or unfair to shareholders in the defendant company, and I desire also to say that the Court is not in a position, and is not in possession of sufficient materials, to say whether they are fair or not, and I expressly abstain from saying anything about that. The only question is whether the company are acting within their powers. [His Lordship stated the facts, reading the clauses (w) and (x) of the memorandum of association above set out, and the material part of the agreement of 22 January, 1906, and the resolutions and the amalgamation scheme, and remarking that nothing in the articles of association called for special mention, and continued:] The plaintiff objects that the agreement and resolutions are *ultra vires*, and the question is whether he is right. Looking at the agreement itself, is it or is it not within the clauses of the memorandum of association? It is said not to be, and that the sale is not a sale within the memorandum. But the clause of the memorandum is in extremely wide terms, and provides that the company may sell for partly or fully paid-up shares. If there were no authority on the point, the fact that the sale was for partly paid shares would not, having regard to the clause, render it outside the memorandum. From the facts which I have stated, it is plain that the agreement was entered into in view of a winding-up. But, again, in the absence of authority, it would not be any the less a sale within the memorandum. But, indeed, on both these points there is authority. It is singular how many of the points raised in this case by themselves are covered by authority. That the sale for unpaid shares, though in view of a winding-up, in the absence of special provision, would not be otherwise than within the clause of the memorandum, was decided by Mr. Justice BUCKLEY in *Mason v. Motor Traction Co.* (5). The headnote there is: "A company authorised by its memorandum of association to sell its undertaking for 'shares' may, if there is nothing in the context or in the memorandum or articles of association as a whole so to qualify the meaning of the word 'shares' as there used as to confine it to fully paid shares, except partly paid shares as consideration." The sale there was with a view to a winding-up, as was the case also in *Doughty v. Lomagunda Reefs*,

Limited (4). Therefore, both on the express terms of the memorandum and upon authority, the fact that the sale in the present case was for partly paid shares and in view of a winding-up does not cause it to be *ultra vires*.

But it is further said that the sale was not within the memorandum because of the provisions of the agreement with reference to the taking up by the company or its nominees of the unpaid shares. Looking at it as an agreement between vendor and purchaser, and having regard to the peculiar nature of the consideration—namely, partly paid shares—I can see nothing in it to render it anything but a *bonâ fide* sale of assets by one company to another. The agreement is in effect one by which a new company purchases the assets with the object of working the assets and carrying on the business; and it is plain from the agreement that in order to carry on the business the new company must be provided with funds, which it will derive from the circumstance that part of the consideration is partly paid shares. Remembering that, it was necessary for the protection of the vendor company, and it was necessary for the purchasing company if they were to get the benefit of the purchase, to make some provisions as to taking up the shares. It was necessary for the vendors to prevent themselves being under an obligation so as to be liable to take the shares themselves and be put on the register and be liable for unpaid calls, and it was necessary for the purchasing company to make some stipulation to ensure, so far as it was possible, the provision of further capital, so as to enable the assets to be employed profitably. That is provided for by clauses 5 and 6 of the agreement. Clause 5 provides, so far as was possible in another agreement, for obtaining fresh capital; it puts the old company under a liability either to take up the shares themselves or to find substantial nominees. The nominees may be the company's own shareholders or not, but the company is to find them within a limited time. That obligation was modified by a subsequent clause. Clause 6 provides that if the company fail to take up, or to find nominees for, the shares within the limited time, they shall not be bound to take the shares themselves, so as to render themselves liable for calls, but the shares which are not taken shall be at the disposal of the purchasing company. Looking at it as an agreement for sale and purchase in view of a winding-up, I think

those provisions are reasonable to insert, and do not prevent it being an agreement for sale within clause (w).

But the plaintiff says the agreement cannot be looked at by itself. To a certain extent that argument is true. The agreement was part of a series of transactions to bring about the reconstruction of an existing company with capital not fully, but partly, paid up. But that does not carry the matter very far. Although the agreement was made with a view to winding up, it left the vendor company free, within limits which were reasonable as between vendor and purchaser, to deal with the consideration money as they thought fit. The authority which was most relied upon by the plaintiff on this point was *Manners v. St. David's Gold and Copper Mines, Limited* (2). The effect of that case was that the Court of Appeal came to the conclusion that the agreement in that case was not a sale within the memorandum, but was a device to compel fully paid shareholders to contribute further capital or forfeit their shares. A vital distinction between that case and the present is that the agreement there bound the vendor company to deal with the consideration in a particular manner, and contained a provision to the effect that any shareholder who did not accept the new shares forfeited for the benefit of the purchasing company his share in the assets of the vendor company. That was the essential element which brought about the decision of the Court of Appeal. The agreement there contained a provision, much as in the present case, that, as part consideration for the transfer, the new company should allot to the old company, or as they should direct, so many shares of 5s. each, with 4s. credited as paid up, and that as further consideration the new company should satisfy the debts and liabilities of the old company and pay the expenses of liquidation. Then it went on: "In case the old company shall go into liquidation within the time aforesaid and distribute the shares forming the consideration for the said sale among its members, all shares not accepted by such members within twenty-one days of the commencement of the winding-up or such extended time as the new company shall consent to shall be sold by the old company and shall be applied in payment of debts and liabilities of the old company in relief of the obligation of the new company under this agreement." The obvious result of the provisions of the agreement there was that the

shareholder in the vendor company was compelled either to take the partly paid shares which were offered, or to lose all his interest in the vendor company ; and not only that, but the value of his interest—that is, the purchase-money which he might have obtained for the shares taken up—went wholly to the purchasing company. That fact was the ground of the decision of the Court of Appeal, and particularly of the judgment of Lord Justice ROMER. After saying what the nature of the agreement was, and that it would not be justified by section 161 if that section had applied, and pointing out that a liquidation was essential, inasmuch as a going company could not distribute its assets among its shareholders in that way, for it would amount to a return of capital, Lord Justice ROMER goes on : “ But it is said that you can justify a provision in such a contract whereby, as in this case, it is made a term of the contract that if a liquidation takes place, then the liquidator shall divide the assets in a particular way, and so that, if a shareholder does not choose to take upon himself a particular liability which he is not bound to take upon himself, his share of the assets shall be forfeited and the proceeds handed over to the purchasing company. To my mind such a contract is altogether *ultra vires* of the selling company. It is not justified as a sale under sub-section (f).” That corresponds with clause (x) in the present case : “ The purchasing company has no right or power to make it a term of such contract that the assets shall be dealt with in that way, nor can the selling company under the pretended exercise of the powers of sub-section (f) pretend to sell its assets with a special contract in favour of the purchasing company that, if a liquidation takes place within a year, the liquidator shall be bound to do something which otherwise the liquidator might not be bound to do, and further that individual shareholders shall be bound to lose their share of the assets, as I have said, for the benefit of the purchasing company if they do not choose to take upon themselves a liability which they are not bound to take upon themselves.” That, then, was the ground of the decision—namely, that the agreement which was entered into contained a stipulation which was not authorised by the memorandum. In the present case there is no such stipulation as there was there. It is left open to the vendor company to make any arrangement they like. Lord

Justice COZENS-HARDY puts it in similar terms. He says: "It is also quite clear that the transaction is not one under section 161, and that if it can be supported at all it must be supported as falling within sub-section (f) of clause 3 of the memorandum. I do not desire to go again over the ground which has been traversed by my Lord, but it seems to me to be impossible to support this agreement as a sale within the meaning of that sub-section. The agreement is a document which purports to impose certain obligations upon the liquidator in the event of a winding-up, and to impose certain penalties upon a shareholder in the old company if and when the liquidation takes effect. It is something altogether different from a contract within the contemplation of sub-section (f), which is a contract for a sale out and out of the whole undertaking, which may be for shares, but the shares when received by the going company must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company." So far as the present agreement is concerned, it is within those words of Lord Justice COZENS-HARDY, as a contract for a sale out and out, which may be for shares, but the shares must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company.

There still remains the final point in the present case: Is the proposed distribution according to the due course of winding up? Each shareholder is to be at liberty to take the shares which are offered him—the shares are to be offered to all the shareholders indiscriminately—but there is the further provision that if any number of shareholders shall not desire to take their shares they shall be sold, and the proceeds distributed among them in proportion to the shares held by them in the old company. I do not think there is anything in this otherwise than in accordance with a distribution in due course of winding up. That is shown by *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited* (1). But, before I deal with that case, what is meant by the due course of administration in a winding-up? It is that the assets shall be sold and the proceeds distributed according to the rights of the members in the company, or else, under clause (x) of the memorandum of association, be distributed among the members in

specie. I assume that the company, having no assets except these shares, propose to distribute them among the members in specie. That would be in due course of winding up. Is it any the less in due course of winding up because some shareholder, to whom the shares are offered, refuses to accept them either because he does not wish to be under the liability for the amount unpaid on them or because he does not care to hold the shares, or for some other reason? Is it made improper because if some shareholder refuses to take up his shares they are to be sold and the proceeds distributed? I think the question is covered by *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited* (1). It is true that was the case of a distribution in a winding-up, but it was after a special resolution under section 161. But the remarks of the Lords Justices apply to the case of a winding-up under the provisions of a memorandum of association. We are now dealing only with the distribution; we have got beyond the point where a shareholder may dissent, and are dealing with the carrying into effect of the scheme in regard to the shares of members who have not dissented. Section 161 says that the liquidator may receive in compensation or part compensation for the transfer or sale of the property of the company being wound up, among other things, "shares" in the purchasing company "for the purpose of distribution amongst the members of the company being wound up." Therefore under section 161 the liquidator has to distribute the shares which he receives amongst the members of the company being wound up. In the present case, under the memorandum of association, unless he sells the shares, he has to distribute them among the members of the company. What does the Court of Appeal say in *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited*? (1) There, as here, the agreement contained provision for dealing with shares not taken up and for the value to be paid to refusing shareholders. In effect, it provided that every shareholder should be entitled as of right to claim an allotment to himself of one partly paid share in the new company for each share held by him in the old company, with a limitation of twenty-one days, or a further time to be determined, within which he must make his claim. Sir N. LINDLEY, M.R., after reading the provisions in question, says, "Pausing there for a moment, it is in practice and as a matter of business impossible

to work out arrangements of this kind unless a time for making and sending in such claims is fixed"—that is, for distribution in specie among the members of the company. "A time which is so short as to be unreasonable would be a ground for objecting to the scheme; but without some kind of limit it is practically impossible to work these schemes through. In fact, it has been decided, not now for the first time, but on previous occasions, that there is no objection to such a provision; and when one bears in mind that, if no time were fixed, there might be disputes as to what is a reasonable time, it is obvious that the mere fact that the time is fixed is not only no objection to the scheme, but removes any objection to it. There is, then, nothing wrong in the scheme so far." Then he refers to the provision putting the shares in the new company which were not allotted at the disposition of the new company, and goes on: "Looking at all these provisions, the substance and effect of the scheme is this: it is a scheme by which the new company takes over the assets of the old company for certain considerations in shares, and so on, and one of the considerations is that the shares in the new company which are not taken up by members of the old company by a particular time shall be at the disposal of the new company. It appears to me, I confess, that that is warranted by the section of the Act which I have read. The objection to it is that this is a provision for forfeiting the shares of the members of the old company. Well, in a sense you may use that language; but, looking at the substance of the thing, it is saying to every member of the old company, 'You shall have as many shares as you are entitled to in the new company if you take the trouble to ask for them within the time fixed, and if you do not you will be treated as not caring to have them.'" He then refers to a query raised by Lord ESHER in *Nicholl v. Eberhardt Co.* [1889] (14), and points out that Lord ESHER was not considering a case like that before him, and his query was not raised as to a question of *ultra vires*. Lord Justice ROMER says: "The benefit he"—that is, the shareholder of the old company—"receives is the right, if he applies within a given time, to call upon the new company to allot him shares partly paid up in the new company in lieu of or in respect of his shares in the old company. Each

member of the old company has that right; an equal right is given to all the members of the old company; there is no preference between one shareholder and another, and no distinction between classes." That language of Lord Justice ROMER supports the contention of the defendants in the present case that the agreement, although it is said to be unequal, does not, in fact, create inequality. The right of each shareholder is to have his due part of the assets distributed in specie. Lord Justice ROMER says, in a case which is much like the present, that that right is complied with by giving to each shareholder the right to require the shares to be allotted to him, and if he does not require them the company may deal with them. So far, therefore, in my view, neither upon authority nor upon principle is the proposed distribution in the present case *ultra vires*.

But it is said that there is something contrary to the view I am taking in *Bisgood v. Nile Valley Co.* (3). Unfortunately that case is at present only reported in the *Times Law Reports*, and it being, of course, a newspaper report, the authorities upon which the Judge acted in giving his decision are not referred to. *Manners v. St. David's Gold and Copper Mines, Limited* (2), is the only case which is referred to, and we do not know what others were cited. But there are two things which are to be noticed in that case. One is that the agreement had not actually been entered into; and I cannot help thinking that that fact may have had something to do with the decision which was arrived at, because Mr. Justice KEKEWICH had not to consider what was the effect of an executed contract, but had rather to consider a proposal and whether it was fair or not. But there is another distinction between that case and this in that that was a case which, as Mr. Justice KEKEWICH held, fell rather within the principle of *Manners v. St. David's Gold and Copper Mines, Limited* (2), because provisions were inserted in the agreement for sale declaring what was to be done with the shares to be distributed, and not leaving the vendor company to deal with them as they thought fit, but binding them by the agreement to deal with them in a way which Mr. Justice KEKEWICH thought improper. I think that was a determining factor in the case, because Mr. Justice KEKEWICH begins by saying that, to work out properly the sale under the terms of the memorandum of association, all

the shares should be under the control of the liquidator, who would have to realise the shares and divide the proceeds among all the shareholders according to their nominal interests in the company. But that was not the method which the company proposed to follow. Instead of the shares being under the control of the liquidator, the proposal was to allot the shares of the new company direct to the shareholders of the old company. In the case of shareholders who were not willing to accept the shares, the shares which were not taken were to be sold by the liquidator for what he could get for them. That is true in the present case, and so far the remarks of Mr. Justice KEKEWICH are in point here. Here the shares are not appropriated to particular shareholders, but are dealt with in a lump. I think Mr. Justice KEKEWICH had before him an appropriation of particular shares to particular shareholders.

The result is that upon the neat question whether the company are acting *ultra vires* I must come to the conclusion they are not. I say nothing as to whether what they are doing is fair or unfair, and I disclaim any intention of expressing an opinion. The motion, therefore, must be refused, and the defendants' costs of the motion will be their costs in the action.

Solicitors: *Greenip, Snell & Co.*, for the Plaintiff.

Vallance, Birkbeck & Barnard, for the Defendants.



AUTOMATIC SELF-CLEANSING FILTER SYNDICATE CO. *v.* CUNINGHAME.

1906, March 22. C. A. COLLINS, M.R., AND COZENS-HARDY, L.J.

Company—Directors—Management—Articles of Association—Resolution of Shareholders at General Meeting—Refusal of Directors to Carry Out—Sale of Assets of Company.

On a requisition of certain shareholders in the plaintiff company, a meeting of the company was convened by the directors in January, 1906, and a resolution was then passed by a simple majority for the sale of the business to a new company, and the directors were directed to cause the seal of the company to be affixed to a contract to effect the sale which had been prepared and was before the meeting. The directors were of opinion that it was not in the interest of the company that the contract should be carried out, and they declined to comply with the resolution. An action was brought by the company, and a shareholder on behalf of himself and all other shareholders, asking that the directors might be ordered to affix the seal of the company to the contract, and for other incidental relief.

Among the objects of the company stated in the memorandum of association was "to sell the undertaking of the company, or any part thereof." By the articles of association the management of the business of the company was vested in the directors, and they had power to do all such things as might be done, and were not by the articles or by statute expressly required to be done, by the company in general meeting, but subject to any regulations which might be made from time to time by the company by extraordinary resolution; and they had power to sell or deal with any property of the company on such terms as they might think fit. A director could only be removed from office by a special resolution of the company:

Held, that the directors were in the position of managing partners, and their mandate was the mandate of the whole body of shareholders, not of the majority only. If that mandate had to be altered, it could only be done by the machinery provided by the articles, and it was not competent for a simple majority of the shareholders by a resolution at an ordinary general meeting to alter the mandate and override the discretion of the directors.

APPEAL from decision of WARRINGTON, J.

The company was incorporated on 10 June, 1896, with the object (*inter alia*) of acquiring the benefit of certain existing inventions in relation to the filtration treatment, purification, storage, application, distribution, and use of liquids. Among the other objects stated in the memorandum of association was "to sell the undertaking of the company, or any part thereof, for such consideration as the company may deem fit, and in particular for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company."

The articles of association of the company provided (article 76) for the retirement of the directors by rotation ; and (article 81) that the company might by special resolution remove any director before the expiration of his period of office, and appoint another qualified person in his stead, the person so appointed to hold office during such time only as the director in whose place he was appointed would have held the same if he had not been removed. Article 83 provided that the company in general meeting might from time to time appoint one of the directors, or any other person, to be managing director of the company, either for a fixed term or without any limitation as to the period for which he was to hold office, and might from time to time remove or dismiss him from office, and appoint another in his place, article 86 that the directors might from time to time entrust to and confer upon a managing director for the time being such of the powers exercisable under the articles by the directors as they might think fit, and upon such terms and conditions and with such restrictions as they thought expedient.

Article 96 provided : "The management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby, or by statute, expressly directed or required to be exercised or done by the company in general meeting, but subject, nevertheless, to the provisions of the statutes and of these presents, and to such regulations, not being inconsistent with these presents, as may from time to time be made by extraordinary resolution, but no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Article 97 : "Without prejudice to the general powers conferred by the last preceding clause, and to the other powers and authorities conferred as aforesaid, it is hereby expressly declared that the directors shall be entrusted with the following powers, namely, power—(1) to purchase or otherwise acquire for the company any property, letters patent, rights, or privileges which the company is authorised to acquire, at such price and generally on such terms

and conditions as they may think fit, also to sell, lease, abandon, or otherwise deal with, any property, rights, or privileges to which the company may be entitled, on such terms and conditions as they may think fit; . . . (16) to enter into all such negotiations and contracts, and rescind and vary all such contracts, and execute and do all such acts, deeds, and things in the name and on behalf of the company, as they may consider expedient for or in relation to any of the matters aforesaid, or otherwise for the purposes of the company."

The plaintiff McDiarmid was the holder of 1,202 shares in the company out of a total issue of 2,700 shares. He wished that the assets and undertakings of the company should be sold to a new company formed for the purpose of acquiring them, and he had the terms of the proposed sale embodied in a contract, which was engrossed ready for execution by the company, and called upon the directors to call a meeting of the shareholders to deal with the matter.

In accordance with that requisition, the directors convened a meeting for 2 January, 1906, for the purpose of considering and, if thought fit, passing the following resolution: "That the company do sell the assets specified in the contract which has been produced to the meeting at the price and on the terms therein mentioned and contained, and that the directors be and they are hereby directed to cause the common seal of the company to be affixed thereto within seven days, and to carry the same into effect."

The meeting was held, and was adjourned to 16 January, when the resolution was passed by a majority of 304 votes, 1,502 being given for it, and 1,198 against it. The directors were of opinion that it would not be to the interest of the company that the contract should be carried out, and they declined to act upon the resolution.

An action was thereupon brought in the name of the company and the plaintiff McDiarmid, suing on behalf of himself and all other shareholders in the company other than the defendants, against the directors for the purpose of obliging them to act upon the resolution; and the plaintiffs moved that the directors might be ordered forthwith to affix the seal of the company to the contract and to carry it into effect, and that they might be restrained by

injunction until the trial of the action from disposing of the assets of the company intended to be comprised in the agreement in any manner inconsistent with the terms thereof.

WARRINGTON, J., refused the motion. He was of opinion that the directors honestly believed that it was undesirable in the interests of the company that the agreement should be carried out.

The plaintiffs appealed.

Gore-Browne, K.C., and A. H. Jessel, for the appellants:

Directors are only the servants or agents of the company, and it is for the principals to direct the policy to be adopted. The majority at a general meeting are the persons to declare the policy unless the minority can show that they are using their voting power improperly, and then the minority can get relief: *Menier v. Hooper's Telegraph Works* (1874) (1) and *Atwool v. Merryweather* (1867) (2). If the defendants' contention is right, there would be nothing left for the company to do—all their powers would be vested in the directors. That would not be a proper construction of article 96. As a fact, this particular sale could not have been made by the directors under article 97, though it could be made by the company under the memorandum of association. Article 97 limits the powers of the directors. A company ought not to have its affairs put under the absolute control of its directors: *Browne v. La Trinidad* (1887) (3), *Grant v. Thompson's Patent Gravity Switchback Railways Co.* (1888) (4), *Bainbridge v. Smith* (1889) (5), and *North-West Transportation Co. v. Beatty* (1887) (6). *Isle of Wight Railway v. Tahourdin* (1889) (7) is in point. It was, no doubt, a case under the Companies Clauses Act, but the principle applies in cases under the Companies Acts also: *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882) (8).

(1) L. R. 9 Ch. 350; 43 L. J. Ch. 330; 30 L. T. 209; 22 W. R. 396.

(2) L. R. 5 Eq. 464, n.; 37 L. J. Ch. 35.

(3) 37 Ch. D. 1, 13; 57 L. J. Ch. 292, 297; 58 L. T. 137; 36 W. R. 289.

(4) 40 Ch. D. 135; 58 L. J. Ch. 211; 60 L. T. 525; 37 W. R. 312; 1 Meg.

117.

(5) 41 Ch. D. 462; 60 L. T. 879; 37 W. R. 594.

(6) 12 App. Cas. 589; 56 L. J. P. C. 102; 57 L. T. 426; 36 W. R. 647.

(7) 25 Ch. D. 320, 330; 53 L. J. Ch. 353, 358; 50 L. T. 132; 32 W. R. 297.

(8) 23 Ch. D. 1; 49 L. T. 147; 31 W. R. 330.

Norton, K.C., and *Mossop*, for the defendants:

This is really a question of partnership rather than of agency. The shareholders are *quasi*-partners, and a simple majority at a general meeting cannot control the action of the directors and managing partners. The directors under these articles can do all that the company can do except in so far as the company may interfere in the manner prescribed by the articles. It is really a question of the construction of the articles. If it is desired to remove the directors, or override their decision, that must be done by special or extraordinary resolution in the manner prescribed by articles 81 and 96. The company in general meeting cannot tell the directors how to manage the business. In the case of a bank, for instance, it would be absurd to suppose that the company in general meeting could tell the directors what rate of interest to allow on deposits.

Gore-Browne, K.C., replied.

COLLINS, M.R., referred to the facts, and continued : The question is whether under the memorandum and articles of association of this company the directors are bound to accept, in substitution for their own view, the view contained in a particular resolution at a meeting of the company. Mr. Justice WARRINGTON held that the majority could not impose that obligation upon the directors, and that on the true construction of the articles the directors were the persons authorised to effect the sale if it were to be effected ; and unless the other powers given by the memorandum were invoked by a special resolution, that it was impossible for a mere majority at a meeting to override the views of the directors. That depends, as Mr. Justice WARRINGTON said, upon the construction of the articles. There is no doubt that the company under its memorandum has the power to sell its undertaking, or any part thereof. I believe something less than the whole undertaking was proposed to be sold in this case, but that is not material here. The material articles are article 81 and articles 96 and 97, which define the powers of the directors, with this very important limitation in article 96 : " subject nevertheless to the provisions of the statutes and of these presents, and to such regulations, not being inconsistent with these

presents, as may from time to time be made by extraordinary resolution." Therefore in these matters, by the express terms of the articles, the view of the directors as to the fitness of the matter is made the standard, and furthermore they are given in express terms the full powers which the company has, except so far as they are not by the articles or by statute expressly directed or required to be exercised or done by the company, subject to the limitation which I have mentioned.

So that, if it is desired to alter the powers of the directors, it must be done not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. Under those circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors by the articles of association.

It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents, but the question is, For whom are they agents? There is, in theory and law, one entity—the company—which might be a principal; but we have to go behind that when we look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. There is not in truth and in fact one principal only, but provisions are made as regards the management of this company for effect being given to the views of individual shareholders, and the views of a minority are to be taken into account; and it is not fair to say that a majority at an ordinary meeting is the principal, so as to alter the mandate of the agents. There are conditions under which the minority may be overborne, but that has to be done by the special machinery of special resolutions. Short of that, the mind is not the mind of the majority. It is the mind of the whole entity made up of all the shareholders, and it is not competent, on the ground that the majority are the principals, to assume that the agents are bound to deal with them only. The mandate is not from them

only, but from all the shareholders, and if that mandate is to be altered it can only be done under the machinery provided by the memorandum and articles.

I do not think I need say more; but one argument adduced by Mr. Justice WARRINGTON is a formidable one in favour of his view. He says, with regard to the provisions in these articles, that a director can only be removed by special resolution, that it would be of no use if the directors can be practically governed by the mandate of a mere majority of shareholders at an ordinary meeting. Practically, the special meeting for removing a director would not be wanted if the company could do without him, and compel something other than his view to be carried into effect by a mere majority at an ordinary meeting. I think that that argument confirms the view which the learned Judge took.

With regard to the cases cited, I do not think that any of them really apply, and indeed I do not think that counsel for the appellants looked upon them as more than presenting some analogy. The only case which, at first sight, appeared to me approximately near this case was *Isle of Wight Railway v. Tahourdin* (7); but when that is looked into, as was pointed out by Lord Justice COZENS-HARDY, it rests upon a different statute—a statute differing in the most essential point—namely, in the limitation of the authority. Therefore that case has no direct bearing on the case before us.

On these grounds, which really are the same grounds as those relied upon by the learned Judge below, I am of opinion that this appeal fails.

COZENS-HARDY, L.J.: I am of the same opinion. I cannot help thinking that it is somewhat remarkable that in the year 1906 this interesting and important question of company law should for the first time arise for decision. It is perhaps necessary to go back to the root principle which governs this case under the Companies Act, 1862. It has been decided that the articles of association are a contract between the members of the company *inter se*. That was settled finally by the case of *Browne v. La Trinidad* (8), if it was not settled before. We must, therefore, consider what is the

relevant contract which these shareholders have entered into; and that contract, of course, is to be found in the memorandum and articles. I will not again read articles 96 and 97, but it seems to me that the shareholders have by their express contract *inter se* mutually stipulated that their common affairs should be managed by certain directors to be appointed by the shareholders in a certain manner described by other articles, such directors only being capable of being removed by special resolution. If there is a stipulation of that kind in a contract made between the parties, what right is there to interfere with the contract, apart, of course, from any misconduct on the part of the directors? There is no such misconduct in the present case. Is there any analogy which supports the case of the plaintiffs? I think not. It seems to me the analogy is all the other way. Take the case of an ordinary partnership. If in an ordinary partnership there is a stipulation in the partnership deed that the partnership business shall be managed by one of the partners, it would, I think, be plain that in the absence of misconduct, or in the absence of circumstances involving the total dissolution of the partnership, the majority of the partners would have no right to apply to the Court to restrain or to interfere with the management of the partnership business. I would refer to what Lord LINDLEY says in his book on Partnerships (6th ed.), p. 530: "Where, however, the partner complained of has by agreement been constituted the active managing partner, the Court will not interfere with him unless a strong case be made out against him"—that is to say, unless there is some case of fraud or misconduct to justify the interference of the Court. Nor is this doctrine limited to a case of co-partners. It is not a peculiar incident of co-partnership. It applies equally to cases of co-ownership. I think in some of the earlier cases before Lord ELDON, with reference to the co-owners of one of the theatres, he laid down the principle that when the co-owners had appointed a particular member to be manager the Court would not, except in the case of misconduct, interfere with him. And why? Because it is a fallacy to say that the relation is that of simple principal and agent. The person who is managing is managing for himself as well as for the others. It is not in the least a case where there is a master on the one side and a mere servant on the other. We are

dealing here, as in the case of a partnership, with parties having individual rights as to which there are mutual stipulations for their common benefit ; and when we once get that, it seems to me that there is no ground for saying that the mere majority can put an end to the express stipulations contained in the bargain which they have made. Still less can that be so, as it seems to me, when we find in the contract itself provisions which show an intention that the powers conferred upon the directors can only be varied by extraordinary resolution—that is to say, by a three-fourths majority at one meeting and a simple majority at a confirmatory meeting. That being so, if we once get clear of the view that the directors are mere agents of the company, I cannot see anything in principle to justify the contention that the directors, who are appointed by the whole body of shareholders, are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of the shareholders. I do not think it true to say the directors are agents. I think it is more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders. In principle I agree entirely with what the MASTER OF THE ROLLS has said, agreeing as he does with what Mr. Justice WARRINGTON said.

When we come to the authorities there is, I think, nothing even approaching to an authority in favour of the appellants' case. The case of *Isle of Wight Railway v. Tahourdin* (7), at the utmost, contained a *dictum* which at first sight looked in favour of the appellants' argument ; but, treating it as an authority, it is an authority upon an Act which differed in a vital point from the Act which we are now considering, because, although by section 90 of the Companies Clauses Act, 1845, the directors have powers of management and superintendence very similar to those found in article 55 of Table A, and articles 96 and 97 of this company, there are these words, vital for the present purpose : "And the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose." If those words had been found in the Companies Act, 1862, the appellants' case would have been comparatively clear. I see no ground for reading them into the Companies Act, 1862,

or into the memorandum and articles of association of this company.

For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors : *McDiarmid & Son*, for the Appellants.

H. Mossop, for the Respondents.

**IN RE W. C. HORNE AND SONS, LIMITED, HORNE
*v. W. C. HORNE AND SONS, LIMITED.***

1905, December 7. FARWELL, J.

Solicitor — Costs — Debenture-holders' Action — Solvent Company — Recovery and Preservation of Assets outside Action — Difference between Party and Party and Solicitor and Client Costs — Charging Order — Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.

The Court will give the solicitor to the plaintiff in a debenture-holders' action a charging order, under section 28 of the Solicitors Act, 1860, on the property recovered in the action for the debenture-holders, for his costs in the action as between solicitor and client, even when the property so recovered proves sufficient for the payment of the debenture-holders in full, provided that there is reason to believe that he will not be able to recover from his own client the difference between solicitor and client and party and party costs.

Dictum of KAY, J., in Harrison v. Cornwall Minerals Railway (1) followed.

ADJOURNED SUMMONS.

This summons was taken out by the solicitor to the plaintiff in a debenture-holders' action, which was commenced on or about 6 June, 1904. The result of this action was that the plaintiff, and the rest of the debenture-holders on behalf of whom he sued, would ultimately be paid their debentures in full, and that a balance would remain to the credit of the company.

This result had largely been brought about by the exertions of the plaintiff's solicitor, who had recovered much property for the receiver appointed on behalf of the debenture-holders which was otherwise in jeopardy of loss. In particular he had conducted on behalf of the receiver three actions in the King's Bench Division

(1) 53 L. J. Ch. 596, 597; 50 L. T. 452; 32 W. R. 748; 48 J. P. 724.

and three in the county courts of Sheffield and Hull, by which various sums of money had been recovered from various defendants. He also had charge of seven claims in Germany, which had necessitated two separate journeys to Leipsic, and had further been instrumental in other ways in preserving and recovering the property of the company. In doing this he had incurred great labour, and had also been put to considerable out-of-pocket expenses.

In accordance with the principle laid down in *In re Queen's Hotel (Cardiff) Co., London and Provincial Bank v. Queen's Hotel (Cardiff) Co.*; *In re Vernon Tinplate Co., London and Provincial Bank v. Vernon Tinplate Co.* [1900] (2), the plaintiff was entitled only to party and party costs in the action, not to solicitor and client costs, since the money due on the debentures would ultimately be recovered in full.

The present summons was accordingly taken out by the plaintiff's solicitor, asking that he might be given a charge for all his "taxed costs, charges, and expenses," on the funds recovered in the course of the action, under section 28 of the Solicitors Act, 1860.

It appeared from the evidence given during the hearing of the summons that there was no probability that the solicitor would be able to recover the difference between party and party and solicitor and client costs from his own client, the plaintiff.

Waggett, for the solicitor :

It is well settled that the plaintiff in a debenture-holders' action, suing on behalf of himself and of all other debenture-holders, is entitled, if the estate prove more than sufficient for the payment of all the debentures in full, only to party and party costs: *In re Queen's Hotel (Cardiff) Co.* (2), although, on the other hand, if the estate prove insufficient, he is entitled to costs as between solicitor and client: *In re New Zealand Midland Railway, Smith v. Lubbock* [1901] (3). The principle of distinction is this: that in the first case the difference would be recovered, if recovered at all, at the expense, not of the debenture-holders benefited, but of the

(2) 7 Manson, 238; [1900] 1 Ch. 792; 69 L. J. Ch. 414; 82 L. T. 675; 48 W. R. 567.

(3) 8 Manson, 363; [1901] 2 Ch. 357; 70 L. J. Ch. 595; 84 L. T. 852; 49 W. R. 529.

creditors and shareholders of the company; in the second case it is recovered, as is only just, at the expense solely of the debenture-holders benefited. In the present case, however, the claim for the difference between the two kinds of costs is not made on behalf of the plaintiff at all; it is made on behalf of his solicitor, who is likely, if he does not succeed on the present summons, to lose the difference altogether, since it is unlikely that he will recover it from the plaintiff. That being so, it is only equitable that he should be allowed to recover the difference by means of the machinery provided by section 28 of the Solicitors Act, 1860. In fact, in *Harrison v. Cornwall Minerals Railway* [1884] (1), KAY, J., distinctly affirmed that "if it were suggested that there was the least danger of these solicitors not getting their costs, [he] should not hesitate to make" an order similar to the order now asked for. That reasoning applies to the difference between the two classes of costs considered merely as costs of the action. In this case, however, the solicitor asks also for a charging order for his costs incurred, in a sense, outside the strict action, in preserving and recovering much property for the receiver, and for this he is undoubtedly entitled to a charging order: *In re Hill* [1886] (4) and *In re Knight, Knight v. Gardner* [1892] (5). This claim, in fact, is really a claim for services in the nature of a salvage: *Pelsall Coal and Iron Co. v. London and North Western Railway* (No. 3) [1892] (6). Lastly, assuming that we are entitled to any charge at all for the difference between the two sets of costs, the charge should be given as against the whole fund that is recovered on behalf of the company: *Greer v. Young* [1883] (7) and *Scholey v. Peck* [1898] (8).

J. M. Stone, for the defendant company:

Section 28 of the Solicitors Act, 1860, was never intended so to alter the incidence of costs as practically to give the plaintiff in a debenture-holders' action costs to which he otherwise would never

(4) 33 Ch. D. 266; 55 L. T. 104.

(5) [1892] 2 Ch. 38; 61 L. J. Ch. 399; 66 L. T. 646; 40 W. R. 460.

(6) 8 Ry. & Can. Traffic Cas. 146.

(7) 24 Ch. D. 545; 52 L. J. Ch. 915; 49 L. T. 224; 31 W. R. 930.

(8) [1893] 1 Ch. 709; 62 L. J. Ch. 658; 68 L. T. 118; 41 W. R. 508; 3 R.

have been entitled ; it was intended merely to enable a solicitor to enforce his common law lien in a convenient manner, not to alter the burden of costs as between defendant and plaintiff. It is noticeable that the section deals only with "the taxed costs, charges, and expenses of or in reference to [the] suit, matter, or proceeding." In the present case it is clear that the "taxed" costs of the action can only be the costs of the plaintiff as between party and party ; nor can it be claimed that the costs of the action are included under the alternative words "charges and expenses." With regard, again, to the costs of recovering and preserving the property of the company outside the action, it is clear that the words "property recovered or preserved" refer only to property recovered or preserved in the action itself.

Shebbeare, for the plaintiff, referred to *In the goods of Murnaghan, M'Conville v. Williams* [1903] (9).

FARWELL, J.: The plaintiff in this case has been so successful as to recover more than enough to pay all the debenture-holders in full, and still to leave a surplus for the company. According to the usual practice of the Court, however, he cannot recover solicitor and client costs in the action, because the rule grants such costs, in a debenture-holders' action, only when the estate is insolvent and then gives them to the plaintiff who has recovered, not at the expense of the insolvent company, but at the expense of his fellow-debenture-holders. That rule, in a general way, seems to me eminently fair and just. The principle that underlies it is lucidly explained by Lord Justice STIRLING in *In re New Zealand Midland Railway, Smith v. Lubbock* (3) : "The only difficulty which arises with reference to whether the practice rests on principle or not appears to me to be this, that courts of equity have not been quite logical in following out the principle which was laid down by KINDERSLEY, V.-C. (10). If it were true that in all cases where a creditor has, for the benefit of all the other creditors, instituted a suit and recovered a fund he should get his costs as between solicitor

(9) [1903] 2 Ir. R. 287.

(10) In *Thomas v. Jones* [1860], 1 Dr. & Sm. 134; 29 L. J. Ch. 570; 6 Jur. (N.S.) 391; 8 W. R. 328.

and client, and not as between party and party only, it would seem logical that the rule ought to apply where the fund recovered is sufficient to pay the debts in full. The plaintiff creditor would not, indeed, be entitled to get those costs as against the representative of the deceased, or out of his estate; but, inasmuch as the creditors come in and get the benefit of the action, it would seem right that the plaintiff, if this rule be founded on principle, should get them out of the fund which has been acquired by his exertions for the benefit of all the creditors—that is to say, that they should be taken in the first instance out of the fund which is available for payment of the creditors' debts, and then the balance distributed rateably among the creditors." His Lordship then referred to certain special cases which were said to be based on certain special circumstances, and continued: "That is really the only difficulty. In other respects, the principle stated by KINDERSLEY, V.-C., is a most reasonable one, namely, that where the fund recovered proves insufficient for payment of all creditors in full, or of the class of persons represented by the plaintiff in full, the plaintiff should be entitled to an indemnity from the persons that he represents in respect of the costs which he has incurred on their behalf, and should therefore have his costs as between solicitor and client and not as between party and party."

Now it is obvious that I have no power to alter this rule of the Court by ordering any direct payment to the plaintiff of solicitor and client costs in the present action out of the funds of the company or even out of the funds now recovered on behalf of the debenture-holders. But section 28 of the Solicitors Act, 1860, as construed by the authorities, and especially as construed in *Greer v. Young* (7), enables the Court to give a solicitor in any "suit, matter, or proceeding" a charge over "property recovered and preserved" by his exertions "for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding." Am I, then, justified in using this jurisdiction in order to enable the solicitor to the plaintiff in the present case to recover the difference between party and party and solicitor and client costs, there being evidence before me to show that the plaintiff will not be able to pay that difference himself? I am assisted in this problem by

what is said by Mr. Justice KAY in *Harrison v. Cornwall Minerals Railway* (1), to some extent an analogous case: "The plaintiff's solicitors now come, under this statute, which was passed for the benefit of attorneys and solicitors, asking that the difference between party and party costs and the solicitor and client costs which have not been ordered to be paid out of this fund shall be charged upon it. The plaintiffs are men of good position, and there is no suggestion that they are unable to pay these costs, and I may therefore assume that the solicitors are in no danger of losing them, so that it really makes no difference to them whether this order is made or not. I tested this during the argument by suggesting to Mr. Stirling that he should take an order for a charge in case the applicants should be unable to obtain payment from their clients, but he declined to take an order in that form. It is quite clear, therefore, to me that this is not in fact an application by the solicitors, but by the plaintiffs themselves, who are seeking to get the difference between party and party and solicitor and client costs paid out of the fund. That is not a purpose for which this Act was intended. It was meant solely for the benefit of solicitors, and not for that of their clients. It was no doubt intended to give the Court the widest possible discretion; and if it were suggested that there was the least danger of these solicitors not getting their costs, I should not hesitate to make the order." Now the case suggested in this last sentence by Mr. Justice KAY is a case that I have here. In this case the solicitors are certainly in danger of not recovering from the plaintiff the difference between party and party and solicitor and client costs, for there is evidence that the plaintiff cannot pay. That being so, I feel that I am justified in making the order asked. It is impossible, however, under the powers conferred by the section, that I should give the solicitor a charging order for costs on the whole fund eventually available for payment to the liquidator so far as such costs are costs of litigation as distinguished from administration. That is, however, a small matter, and probably confined to the costs of the action down to the time of the judgment. I am able, however, to give him a charge on the whole of that fund for all the subsequent costs of management, of getting into the estate, &c., with regard to which it is proved that they have resulted in making the estate more than solvent. All

these costs, as I pointed out during the argument, are really costs of administration and management, and might properly have been included in the receiver's accounts as part of his costs. These costs will, therefore, be taxed as between solicitor and client, and will be charged upon the whole of the fund that is ultimately available for the payment to the liquidator. I observe that a similar direction was given by Mr. Justice KEKEWICH in *In re New Zealand Midland Railway, Smith v. Lubbock* (8). With regard to the strict costs of the action considered as litigation, I give the applicant also a charging order for these on the fund available for distribution among debenture-holders. As, however, this last charging order is in effect for the benefit of the plaintiff, and is against the interests of the other debenture-holders, the registrar must be satisfied that these other debenture-holders do not wish to be heard in opposition. There may be some little difficulty in drawing up the order, but this, I think, will disappear if the receiver, when he brings in his final account, includes the subsequent costs of management, recovering, &c., as part of his costs, charges, and expenses. They will then come as such before the master, and will be dealt with by him in due course.

The order, as passed by the Registrar on 15 February, 1906, was as follows, so far as is material to the present report:

* * * * *

"And it is ordered that it be referred to the taxing master to tax the costs of the plaintiff of this action as between party and party, and also as between solicitor and client, and to certify the difference, and to tax as between solicitor and client the costs, charges, and expenses of the said Frederick Henry Honey as such solicitor of and in reference to this action, and of recovering and preserving the assets of the defendant company, not included in the said costs of the plaintiff, and including in the costs of the said Frederick Henry Honey his costs of, and incident to, his said application by summons dated 8th June, 1905; and in such taxation the taxing master is to debit the said Frederick Henry Honey with all sums of money (if any) by him received of, or on account of, the plaintiff, or the receiver, in respect of the said costs, charges, and expenses,

and to certify the balance of the said costs of the said Frederick Henry Honey.

* * * * *

" This Court doth declare that the said Frederick Henry Honey is entitled to a charge upon the [portion of the fund in Court attributable to the final dividend of 5s. upon the principal amount of the debentures and the arrears of interest] for the amount of the difference between the plaintiff's said costs as between party and party and solicitor and client hereinbefore directed to be certified, and also is entitled to a charge upon the residue of the funds in Court and to be lodged as hereinbefore directed for his costs to be taxed under this order."

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Solicitors : *F. H. Honey*, for the summons and the Plaintiff.
Baillie & Co., for the Defendant Company.

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BROOKES v. HANSEN.

1906, April 4, 5, 6, 11. JOYCE, J.

Company—Prospectus—Misleading Statements—Omissions—Director—Liability—“Sub-purchaser”—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10, sub-s. 1 (f)—Directors’ Liability Act, 1890 (53 & 54 Vict. c. 64).

Where a company is the purchaser of property which at law as well as in equity belongs absolutely to the vendor, section 10, sub-section 1 (f), of the Companies Act, 1900, which prescribes the publication in the prospectus of the name and address of the vendor and the amount of the consideration, does not require that the prospectus shall disclose the amount of the purchase-money paid by the vendor upon his acquisition of the property. Generally speaking, a company is not a "sub-purchaser" for the purposes of this sub-section unless it has to pay purchase-money to some one other than its own vendor; nor need the prospectus contain a statement of the amount of any consideration paid or to be paid by any one other than the company itself. The whole of the consideration, cash, shares, or debentures, payable to any one by the company in respect of the purchase or acquisition of the property, must be stated.

ACTION against one of the directors of the South African Super-Aération, Limited. This company was incorporated on 1 June, 1901, under the Companies Acts, with a nominal share capital of 125,000*l.*, divided into 125,000 shares of 1*l.* each. The prospectus

of the company was issued on the same 1 June, 1901. The material statements in the prospectus were as follows:

"The company is formed to work and develop the super-aération system of dispensing aërated waters from bulk in Cape Colony, Natal, Orange River Colony, Transvaal, and Rhodesia, and to acquire the benefit of the applications already made for letters patent for those colonies in relation thereto, and the exclusive rights to the letters patent when granted. By this method, so successfully exploited in the United Kingdom by Super-Aération, Limited, the very heavy expense of bottling at the factory, corking, wiring, loss in breakages, packing, and handling is avoided, and the cost of distribution reduced to a minimum. . . .

"The London company, formed in March last with a nominal capital of 800,000*l.*, was largely over-subscribed, and the shares stand in the market at a substantial premium.

"The purchase consideration for the rights aforesaid payable by the company under the contract for sale hereinafter mentioned is 58,500*l.*, payable as to 40,000*l.* in cash and as to 18,500*l.* in cash or fully paid shares of the company, at the option of the directors. . . .

"The names and addresses of the vendors are as follows:—The African Patent Rights, Limited, of No. 39, New Broad Street, London, E.C., has agreed to sell to this company the said rights for the consideration stated, . . . out of which they have agreed to pay to the Imperial and Foreign Investments Corporation, Limited, of No. 70, Cornhill, E.C., and the Industrial and Banking Issue Corporation, Limited, of No. 88, Bishopsgate Street, E.C., the issuing houses, in equal proportions the sum of 5,000*l.* in cash or fully paid shares of the company.

"The following contracts have been entered into:—(1) A contract dated May 11, 1901, and made between James Anson Wheeler, of the one part, and the African Patent Rights, Limited, of the other part. (2) A contract dated June 1, 1901, and made between the African Patent Rights, Limited, of the one part, and Francis R. Wolseley, as trustee for the company, of the other part, for the purchase by this company of the rights mentioned, on the terms above stated."

Inspection of these documents was offered.

The plaintiff received a copy of this prospectus; and, relying upon the statements and representations therein, he applied for and was allotted eighty shares of 1*l.* each; in respect of which he paid 80*l.* These shares subsequently proved to be of no value. In his statement of claim the plaintiff alleged that the prospectus contained material statements in themselves untrue and misleading, and also untrue and misleading by reason of the suppression of material facts, and numerous particulars were given. The plaintiff alleged *inter alia*, first, that the super-aëration system was not protected by letters patent, or being worked profitably; that there were only two letters patent granted in 1891 and 1899 respectively, and they were worthless; that none of the applications alleged to have been made for letters patent in the colonies had been made; and that the manufacture of aerated waters did not form part of the system: secondly, with regard to the London company, that only 60,000*l.*, part of the 300,000*l.*, had been offered for subscription; that it had not been over-subscribed or subscribed at all by the general public; and if the shares stood at a premium, it was not a genuine one: thirdly, that the prospectus was not in compliance with section 10 of the Companies Act, 1900, in various particulars, *inter alia* that the names and addresses of the vendors of the property, and the amounts payable in cash or shares to each vendor, were not stated in the prospectus, as required by section 10, sub-section 1 (f) (1); and that the company was a "sub-purchaser" of such property, and there were separate vendors within the meaning of the sub-section.

The plaintiff accordingly claimed a declaration that the defendant was liable to pay him compensation for the loss sustained by him by reason of the untrue statements and omissions,

(1) Companies Act, 1900, s. 10, sub-s. 1: "Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state— . . . (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly

out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor."

and consequential relief. The defence was a general traverse of the material statements in the claim, and a plea that if there was any material contract in existence at the date of the prospectus other than those disclosed (which he did not admit), the defendant was not cognisant thereof, or honestly believed the same to be immaterial; and if the prospectus contained any untrue statement (which the defendant did not admit), he had reasonable ground for believing—and did, up to the time of the allotment of the shares to the plaintiff, believe—that such statement was true.

With regard to the sufficiency of the statement as to the contracts, it appeared that on 11 May, 1901, an agreement was entered into between James Anson Wheeler, as vendor, and the African Patent Rights, Limited, as purchasers, whereby the vendor agreed to sell, and the purchasers to purchase, the rights of the vendor and one Frank Bracebridge Mills to the grant of protection or letters patent for an invention for the colonies. This invention was stated in a schedule to the deed to be "Improvements in apparatus for supplying aërated liquids from bulk on draught," as specified in the patent for the United Kingdom No. 919 of 1899; and it was stated that applications for letters patent for the said invention were pending in Cape Colony, Natal, Orange River, Transvaal, and Rhodesia. The consideration for this sale was 15,000*l.*, to be paid in cash by the purchaser to the vendor, 1,000*l.* to be paid on the execution of the agreement and 14,000*l.* on or before 17 June, 1901. As a fact, the 14,000*l.* was borrowed from Mr. F. R. Wolseley in two sums of 8,000*l.* and 6,000*l.*, and paid over to Wheeler on 31 March, 1901. The second contract was dated 1 June, 1901, and was entered into between the African Patent Rights, Limited, and F. R. Wolseley, as trustee for South African Super-Aëration, Limited, for the purchase by the last-named company of the benefit of the applications for the said letters patent for the colonies, and the exclusive right to the same patents when granted, for the sum of 58,500*l.*

Younger, K.C., and Ricardo, for the plaintiff:

The first material misstatement in the prospectus is in respect of the so-called super-aëration system. There was none such in existence. The company has only acquired in fact one patent,

that of No. 919 of 1899, and that is for what is called a draught arm; and there is no right to manufacture any aërated waters. Then, secondly, there is the misstatement with regard to the over-subscription of the London company. As a fact, only 60,000 of the 300,000 shares were issued, and 50,000*l.* of that was underwritten and not subscribed for by the public. The statement was therefore untrue, as it led people to believe that the whole of the shares had been subscribed for. The statement that the system had been successfully worked in England was also untrue. A third complaint is of a most material omission from the prospectus—namely, that of the price paid for these patent rights by the immediate vendor to the company. The price of 15,000*l.* paid by the African Patent Rights, Limited, to Wheeler should have been set out, and Wheeler should have been stated to be one of the vendors. That is required by section 10, sub-section 1 (*f*), of the Companies Act, 1900 (1). The money to make this payment was borrowed from Mr. F. R. Wolseley, and was not provided by the African Patent Rights, Limited. Although the money was paid, the contract was not completed, as the vendor had to apply for the letters patent. There is a difference between payment by the purchaser and completion.

Hughes, K.C., and J. W. M. Holmes, for the defendant:

With regard to the point made under section 10 of the Act of 1900, which is the main question to be argued, there has been no omission or misstatement. It is not within the section at all. What section 10, sub-section 1 (*f*), is aimed at is to compel the company to disclose what it is itself going to pay for the property which it is acquiring. The Act does not contemplate that the prices paid, it may be, by a succession of people shall be stated in the prospectus, so long as the transaction in each case is completed. Here the whole of the purchase-money was paid to Wheeler before the incorporation of the South African Super-Aëration, Limited. The sale was completed, and the company is not a sub-purchaser at all. The purchase-money was not to be paid to the original vendor, or to anyone other than their immediate vendor. Wheeler was not, therefore, a vendor within the section, and the price paid to him need not be stated. All that was really sold was the right to certain letters patent, and that was clearly

completed on 31 May, 1901. The provisions of the Stamp Act, 1891, s. 58, sub-ss. 4, 5, and 6, show what is meant by a sub-purchaser.

A man cannot be called a separate vendor unless some of the purchase-money is going to him in payment; but that is not the case here. There is also a complete answer to the claim apart from the statute. The action here is one for damages, and the plaintiff must prove damage and show that if he had known of the terms of this contract he would not have taken shares. That he has not done: *Macleay v. Tait* [1905] (2) and *Nash v. Calthorpe* [1905] (3). Those were cases under section 38 of the Companies Act, 1867. Here the non-disclosure did not occasion any damage to the plaintiff, and he fails because he has not shown the omission to be material.

Younger, K.C., in reply:

Unless there is both completion and payment, the section applies. It requires the person responsible for the prospectus to set forth all the money which passed up to the price ultimately paid. It was certainly material for a would-be investor to know that 15,000*l.* was given for this property a few weeks before it was sold for 58,500*l.* The defendant is therefore liable, under the Directors' Liability Act, 1890, for these misleading statements. They are untrue within the meaning of that Act: *Greenwood v. Leather-shod Wheel Co.* [1899] (4) and *Aaron's Reefs, Limited v. Twiss* [1896] (5).

Cur. adv. vult.

April 11.

JOYCE, J.: This is an action against a director of a company entitled the South African Super-Aëration, Limited, in respect of certain alleged misstatements and omissions in the prospectus of the company, to which the defendant's name was attached as a director. The defendant is a foreigner by birth, having been born in

(2) *Ante*, p. 24; [1906] A. C. 24; 75 L. J. Ch. 90; 94 L. T. 68; 54 W. R. 365.

(3) 12 Manson, 260; [1905] 2 Ch. 237; 74 L. J. Ch. 493; 93 L. T. 585; 21 T. L. R. 587.

(4) 7 Manson, 210; [1900] 1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595.

(5) [1896] A. C. 273; 65 L. J. P. C. 54; 74 L. T. 794.

Denmark; but he has been naturalised in this country, and he has carried on an extensive business in partnership as a merchant in the city of London, and in various places in South Africa. He was a *bonâ fide* investor in the company, and his firm in South Africa were to be the general managers of the company, their names being mentioned in the prospectus. His object was not to resell the shares for which he had subscribed, but his interest was in the success and continued prosperity of the company. There is no ground for imputing to him any fraudulent intention. The plaintiff's counsel very properly disclaimed all idea of making any such imputation. The defendant appears to me to be a perfectly honest and honourable man, who believed all the statements in the prospectus, whether there were legally sufficient grounds for so doing or not. In the circumstances, no action for deceit could succeed against this defendant in respect of any misstatements in the prospectus. The plaintiff can only, if at all, establish a claim against the defendant upon the ground of there having been some failure in the prospectus to comply with the provisions of the Companies Act, 1900, or otherwise under the Directors' Liability Act of 1890.

The plaintiff, although formerly a gardener and now a laundry-man, appears to have been not without some experience in investing in joint-stock companies. He is the nominee of a committee of disappointed shareholders, whose meetings he has attended. There the prospectus has been discussed, and, I have no doubt, every objection to it thoroughly well canvassed, with the aid of legal advisers. The statement of claim is somewhat lengthy, and contains a formidable indictment against the prospectus, embodying, I think, every possible ground of complaint. But of many, and, I may say, of most, of these I have heard nothing at the trial; and in support of many that I did hear of no real evidence was adduced. The result of the discussion in Court is that there remain only three grounds of complaint requiring to be seriously considered by me. These three are—first, and principally, the non-disclosure in the prospectus of the price paid to their vendor by a company called the African Patent Rights, Limited, who were the vendors to "South African Super-Aëration, Limited," whose prospectus is in question in this case; secondly, the alleged misstatement in the prospectus in reference to the over-subscription

of the company referred to as the "London company"; and thirdly, an alleged misstatement in the description of the company's business, or of the property it was to acquire.

Now, the first ground of complaint depends upon the true construction of sub-section 1 (*f*) of section 10 of the Companies Act, 1900. The prospectus contains a sufficient statement of the name and address of the vendor to the company, and of the full amount payable to such vendor, no consideration being payable or paid by the company to any one else on account of, or in connection with, the purchase. But the property proposed to be sold had been purchased by the vendor not long previously from some one else, and the purchase-money payable to him had, in fact, been discharged and paid only the day before the issue of the prospectus, when completion of this particular purchase took place pursuant to the terms of the contract between the parties, and such contract was in truth completed to all intents and purposes so far as was possible, having regard to the nature of the property, being the benefit of applications for patents in South Africa not yet actually granted.

Where a company is the purchaser of property which, at law as well as in equity, belongs absolutely to the vendor, then clause (*f*) prescribes the publication of the name and address of the vendor in the prospectus and the amount of the consideration, but there is no suggestion of any obligation to disclose the amount of the purchase-money, however small, paid by the vendor on his acquisition of the property, however recent. If what the company buys be merely the benefit of a contract for the purchase of property the consideration for which remains wholly or in part undischarged, and is *pro tanto* a burden upon the property, the company which acquires the benefit of the contract would properly be called a sub-purchaser, and the amount payable by the company to the original vendor as well as to their immediate vendor would, under section 10, sub-section 1 (*f*), have to be stated in the prospectus, and possibly also the name and address of such original vendor as well as of the immediate vendor to the company. Generally speaking, a company is not a sub-purchaser for the purposes of this sub-section unless it has to pay purchase-money (of course including in that debentures and shares) to some one other than its own

vendor, for instance, the vendor or person from whom such immediate vendor purchased. Still, speaking generally, I think that the sub-section does not require the statement in the company's prospectus of the amount of any consideration, cash, shares, or debentures, paid or to be paid by any one other than the company itself. But the whole of the consideration, cash, shares, or debentures, payable to any one by the company in respect of the purchase or acquisition of the property must be stated.

Upon the facts and documents in the present case it does not appear to me that the sub-section required any statement to be made of the amount of the purchase-money actually paid and discharged by the company's vendor, before the issue of the prospectus, to any person or persons from whom they bought the property; and the fact that the company's vendor borrowed the money for the purpose of making such payment, in my opinion, is immaterial. I think the South African Super-Aëration, Limited, was not a "sub-purchaser" within the sub-section. Moreover, all the consideration payable by it was disclosed. In other words, I come to the conclusion that there was not in this case any failure to comply with the provisions of this sub-section. Under these circumstances it is unnecessary for me to consider what the result would have been if there had been a failure to comply with the sub-section.

As to the second ground of complaint, the statement in the prospectus is that "the London Company, formed in March last with a nominal capital of 300,000*l.*, was largely over-subscribed, and the shares stand in the market at a substantial premium," whereas, in fact, the amount of the capital issued for subscription was not the full nominal capital of 300,000*l.*, but only 60,000*l.* Now, I do not consider this to be an accurate statement, and, at all events, I think it was one which was not unlikely to mislead a careless reader. But I do not think that the mere statement about the over-subscription was in any way material, and it is admitted by the plaintiff not to be material, if the subsequent statement was true—namely, that "the shares stand in the market at a substantial premium." This last statement was alleged by the plaintiff, but not proved to be untrue. Upon the evidence before me, I think it must be taken to have been true; and, at all events,

I think the defendant had reasonable ground for believing, and did believe, it to be true.

The third and last ground of complaint is an alleged misstatement in the prospectus of the description of the property to be acquired, or of the nature of the business that was to be carried on. The objects of the company appear by the memorandum of association which is printed in the fold of the prospectus, and they include the power to manufacture mineral water; and upon that one question arose. In my opinion, there is not in the prospectus, when you come to examine it, upon this head any misstatement of which the plaintiff can reasonably complain either upon this subject, or with respect to what the property precisely was which the company was to acquire, especially as all the material documents, in any view of the case, were specified in the prospectus, and inspection was offered. Consequently I come to the conclusion that this action fails, and must be dismissed with costs.

Solicitors : *Joseph Davis*, for the Plaintiff.

Ingle, Holmes, Sons & Pott, for the Defendants.

IN RE CRIGGLESTONE COAL CO., STEWART *v.*
CRIGGLESTONE COAL CO.

1906, January 20. SWINFEN-EADY, J.

Company—Practice—First Debenture-holders' Action—Third Debenture-holders not all Parties—Minutes—Immediate Sale.

In a motion for judgment in a first debenture-holders' action on admissions in the pleadings, one of the proposed minutes asked for an immediate sale by the receiver, under Ord. 51, r. 1B, of the property comprised in the security, which was proved to be in jeopardy of loss. There was also in existence another series of debentures, only some of the holders of which were now before the Court :

Held, that the proposed minute must be varied so as to direct that a sale should take place with the approbation of the Court, as this would enable those second debenture-holders who were not now represented to come in when the contract should come before the Court for its approval.

MOTION for judgment.

This was a first debenture-holders' action by Henry Chalker, suing on behalf of himself and all other the holders of a series of

first debentures amounting to the total value of 25,000*l.*, and by the trustees of the trust deed, dated 25 July, 1895, intended to secure those debentures. The defendant company had also issued a series of second debentures amounting in total value to 20,000*l.*, all of which were held by the second defendant, Christopher Arthur Moulton, and likewise a series of third debentures amounting in total value to 40,000*l.*, 190 of which, out of a total of 400, were held by the third defendant, Edward Allen Brotherton, and thirty of which were held by the plaintiff Chalker. The holders of the remainder of the series of third debentures were not parties to the action.

In recent times the colliery company had been involved in considerable difficulty owing to the existence of a fault in their workings and the influx of unmanageable quantities of water. In consequence it was resolved at a meeting of the directors, held on 8 January, 1906, that the business of the colliery should forthwith cease, but that the pumping and ventilating machinery should be maintained, and that other preparations should be made with a view to the realisation of the collieries. There was reason to believe that the collieries might still in the future be worked with profit by a company with larger capital.

The writ was issued in the present action, and a receiver and manager was appointed of the property of the company, on the following day—*i.e.*, 9 January, 1906.

The principal moneys secured by the first debentures were not due till 1 January, 1910, and the interest payable on them was not in arrear.

The defendant company and the two other defendants by their respective statements of defence, dated 18 January, 1906, admitted all the allegations in the plaintiffs' statement of claim.

The plaintiffs accordingly now moved for judgment, on admissions in the pleadings, in the terms of certain minutes annexed.

One of these minutes asked for a declaration that the plaintiff Henry Chalker, and all other the holders of the first mortgage debentures, were entitled to a charge upon the property of the company for the amount of their debentures.

A second of these minutes provided for an order that the receiver should be at liberty to sell, by public auction or private contract,

all the property, assets, and effects of the defendant company as a going concern.

Macnaghten, K.C., and H. M. Humphry, for the plaintiffs:

The Court is justified, since the security comprised in the debentures is in jeopardy, in ordering an immediate sale under Ord. 51, r. 1B. This has been done even in a case, like the present, in which the principal moneys secured by the debentures were not yet due, and in which the interest was not in arrear: *In re Day and Night Advertising Co., Upward v. Day and Night Advertising Co.* [1900] (1).

E. W. Manson, for the defendant company.

Baden Fuller, for the other defendants.

SWINFEN EADY, J.: I feel some difficulty in making the order asked for in the present form, since some of the third debenture-holders are not before the Court. The difficulty, however, will be met by varying the proposed minute ordering the receiver to sell, and, instead thereof, directing that a sale shall take place with the approbation of the Judge. This will enable the absent third debenture-holders to come in when the contract for sale shall come before the Court for its approval. As for the declaration, this must be retained, since it is the foundation of the jurisdiction under Ord. 51, r. 1B.

Solicitors: *Gribble, Oddie, Sinclair & Johnson*, agents for *Stewart & Chalker*, Wakefield, for all parties.

(1) 48 W. R. 362.

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MONTREAL AND ST. LAWRENCE LIGHT AND
POWER CO. *v.* ROBERT (1).

1905, December 6, 7; 1906, February 7. P. C.

*Company—Sale of Land to Company—Invalidity of Resolution authorising Sale—
Bye-laws of Company.*

The invalidity under the bye-laws of a company of a resolution purporting to authorise the purchase of land by the company cannot affect the rights of the vendor in the absence of notice to him, the bye-laws being matters of internal management to which those who deal with the company have no means of access.

APPEAL from a decision dated 19 January, 1905, of the Court of King's Bench for the Province of Quebec (Appeal side). The facts sufficiently appear in the judgment of the Board.

Sir R. T. Reid, K.C., and R. C. Smith, K.C. (of the Colonial Bar), for the appellants.

MacMaster, K.C., Lafleur, K.C., G. G. Foster, and J. E. Martin
(all of the Colonial Bar), for the respondent.

LORD MACNAGHTEN delivered the judgment of their Lordships: By deed dated 18 July, 1901, and made between the respondent, Edmund Arthur Robert, and the appellants, the Montreal and St. Lawrence Light and Power Co., Robert conveyed to the company a lot of land known as Buisson Point, situated at the Cascade Rapids on the river St. Lawrence, in the county of Beauharnois and province of Quebec, with the right of fishing in the river opposite and attached thereto. The consideration for the purchase, as stated on the face of the deed, was "one dollar, and other good and valuable consideration." The deed was prepared by, and executed in the presence of, Maitre Perodeau, notary public, who was the company's notary. It bore the company's seal. It was signed by Mr. Porteous, the president, and Mr. Kitto, the secretary, of the company. Attached to it was a verified copy of a resolution purporting to have been passed at a meeting of the directors on 17 July, and purporting to authorise the president and secretary

(1) *Coram*, Lord Macnaghten, Lord Davey, Sir Ford North, and Sir Arthur Wilson.

"to complete the transaction and sign the necessary documents." By another deed dated the same day, and made between the same parties, it was declared that the real consideration for the sale was the sum of 15,000 dollars paid in cash, and an agreement to pay the further sum of 260,000 dollars on 30 November then next. It was, however, declared that the purchaser should have the right at any time before 30 November to abandon the purchase by forfeiting the said sum of 15,000 dollars, and by reconveying the property to the vendor, in which case the sale was to be dissolved to all legal intents and purposes.

On 4 January, 1902, the company brought an action against Robert praying for a declaration that the two deeds of 18 July, 1904, were null and void, and asking that the registrar of the county of Beauharnois might be ordered to cancel all entries of the same in the registration books of the county, and that the vendor might be ordered and adjudged to repay the said sum of 15,000 dollars to the company. On 7 January, 1902, Robert brought an action against the company seeking to recover 260,000 dollars as the balance of the purchase-money alleged to be overdue. The two actions were consolidated, and came on to be heard on 30 June, 1903, before Mr. Justice DAVIDSON. The learned Judge maintained the action of the company except so far as it asked for repayment of the 15,000 dollars, and dismissed the action of the respondent Robert. The Superior Court, sitting in review, reversed the judgment of the trial Judge, and dismissed the company's action. Their decision was affirmed by the Court of King's Bench for the Province of Quebec. From the judgment of that Court the present appeal has been brought.

The argument on the appeal before this Board resolved itself into two questions:

- (1) Had the company power to buy Buisson Point?
- (2) Did the company, in fact, buy it?

The company was incorporated in 1888 by a Quebec statute, 51 & 52 Vict. c. 78, under the name of the Chambly Manufacturing Co., for the purpose of creating water power on the river Richelieu, near Chambly, and carrying on business there as an electrical lighting and power company. That Act and a subsequent Act passed in 1895 were replaced by a Quebec statute,

1 Edw. 7, c. 67, assented to on 28 March, 1901; the corporate name of the company was changed to the name of the Montreal and St. Lawrence Light and Power Co., and its powers were again increased.

The provisions of the Act of 1898 were discussed at considerable length. On the one hand, it was argued that by that Act the company was empowered to set up works on any river in the province of Quebec, except that part of the province which forms the judicial district of Quebec; on the other hand, it was contended that, notwithstanding the generality of the language of the Act, the company was still restricted to the use of the river Richelieu and its tributaries, and that its operations must be confined within certain prescribed limits, which do not include or extend to Buisson Point. In the opinion of their Lordships, it is not necessary to pronounce a decision on the construction of the Act of 1898. In view of the provisions of the Act of 1901, under which the company seems to have been absorbed or acquired (as its president prefers to say) by another company known as the Montreal Light, Heat, and Power Co., it would serve no useful purpose to do so. Whatever may be the sphere of the company's operations as described in the Act of 1898, it is clear that the company was empowered to acquire and hold, for the purpose of its business, real or immovable estate not exceeding a specified sum in yearly value in any part of the province outside the prohibited district. The company, acting *bond fide*, must be the sole judge of what is required for the purpose of its business. It appears, therefore, to their Lordships that the transaction in itself was not *ultra vires*, and consequently the first question must be answered in the affirmative.

As regards the second question—the question whether the company did in fact buy, or bind itself to buy, the property—the real difficulty is to ascertain the gist and substance of the company's complaint. There is no suspicion of fraud, or circumvention, or surprise, or collusion. It is not suggested that Robert took advantage of the innocence or inexperience of those with whom he was dealing. They were "all," as James Ross, the Vice-President of the Montreal Light, Heat, and Power Co., said, "first-class business men, and associated with him in many enterprises." It is not suggested that Porteous, the president of the appellant company,

or the secretary, or the notary, betrayed the interests of the company confided to them. There is no entry in the minutes disavowing the action of the president or censuring him for exceeding his instructions. The case presented by the learned counsel for the company in his opening address was that the notion of buying was not in the minds of the directors at all. They wanted—or James Ross, who, though not a director, had a controlling interest in the company and in other companies of the same class, and was the prime mover in the matter, wanted—an option, an option pure and simple, that would lapse of itself if nothing was done. That was the real meaning, it was said, of the resolution of 17 July, 1901; but somehow, without any fault on the part of anybody in particular, the company found itself committed to a purchase. Now the facts of the case, when explained, tell a very different story. It is quite true that at first the negotiation was for an option. It seems that a tender for the lighting of the city of Montreal was then in the market, and Ross and his associates thought that the water power at Buisson Point was at any rate worth securing. They had obtained the offer of an option from Robert, the owner of Buisson Point. Robert saw his opportunity, and, after a week's delay on the part of Ross, pressed for an immediate reply. On 11 July, 1901, he wrote: "I shall consider myself free unless I hear from you to-day." There was no reply, or no satisfactory reply, to this communication. Then he made a definite offer in writing to sell the property to Ross or his nominee on certain terms which gave an option to the purchaser of abandoning the purchase within a fixed time on forfeiting the deposit.

On the same day (11 July, 1901), in the absence of Ross, Porteous, who held the power of attorney from Ross, and was, as Ross said, his "trusted ally," accepted the offer in Ross's name, and declared his nominee to be "the Montreal and St. Lawrence Light and Power Co." Then came the directors' meeting of 17 July. The minutes of that meeting were entered by Porteous himself. The preamble to the resolution certainly contains the word "option." "The purchase," it says, "was to be in the shape of an option up to the 30th November, 1901, for the sum of \$275,000, of which \$15,000 is to be paid in cash on the passing of the deed to the company." The resolution is, "That the president and secretary

be authorised to complete the transaction and sign the necessary documents." If the minutes are read with any attention it becomes quite plain that what was meant was not a mere option, but an actual conveyance with the option of reconveyance within a specified time. So the company's notary must have understood it. In order to prepare the conveyance he must have had before him Robert's offer of 11 July, and Porteous's acceptance of it, as well as the resolution of 17 July. It was his duty "to complete the transaction" so far as the legal part of the business was concerned, and prepare "the necessary documents," and no fault can be found with what he did. The deed was passed, and the deposit of \$15,000 duly paid by the company.

There is no satisfactory explanation why the directors allowed 30 November to slip by without making any move. The directors may have thought that Ross had assumed the management of their affairs. Ross may have supposed that the directors were then looking after their own business. Porteous may have forgotten the terms of their bargain, or he may have judged it expedient to throw the bargain up at that particular moment. Whatever the cause was, Robert was not to blame. His conduct seems to have been quite straightforward and above-board. It was no fault of his if the directors of the company were careless or supine.

Another point was made on behalf of the company. It seems to have been a mere afterthought, for there is no hint of it before the action was launched. It is said that the meeting of 17 July was irregular: there was not a quorum present; therefore the resolution that was passed on that occasion was invalid and goes for nothing. It is quite true that the bye-laws require the presence of three directors to make a quorum, and only two attended on the 17th. But, after all, the bye-laws of a company constituted as the Montreal and St. Lawrence Light and Power Co. was constituted are not public property. They concern matters of an internal management. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials. There was nothing to put Robert on inquiry. The officials of the company—the president, the secretary, and the notary—furnished him with a copy of a resolution which purported to be a resolution of the directors duly and

regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor, "You should not have given credit to what our people told you." If such a plea were listened to no one would be safe in dealing with a company having private regulations of its own, inaccessible to the outside world, to which appeal could be made, in case of need, to relieve it from solemn obligations or save it from a bad bargain.

Such being their Lordships' view, it would seem to be a work of supererogation to inquire whether the resolution of 17 July, if invalid, has been validated by subsequent resolutions or by the subsequent conduct of the company.

On the whole, their Lordships agree with the Superior Court sitting in review at the Court of King's Bench, and they will humbly advise his Majesty that the appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors: *Blake & Redden*, for the Appellants.

Lawrence Jones & Co., for the Respondent.

IN RE ALFRED MELSON & CO.

1906, May 1. BUCKLEY, J.

Company—Winding up—Assets Exhausted by Debentures—Debenture-holders carrying on Business—Unsecured Creditor—Right to Winding-up Order—“Just and Equitable”—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79.

The Court is not bound to exercise its discretion by refusing, at the instance of the company, to make a winding-up order merely on the ground that the order will produce nothing for the unsecured creditors.

A company had a paid-up capital of 2,507*l.*, and a debenture debt of over 6,000*l.* The debentures were held by three individuals. It was doubtful whether there would be assets for the payment of anything to unsecured creditors on a winding-up. A judgment creditor presented a petition for the compulsory winding-up of the company, which was opposed by the company, and neither supported nor opposed by other unsecured creditors:

Held, that, since the debenture-holders were in substance carrying on the business, using the company's name, the company ought, under the “just and equitable” clause of section 79 of the Companies Act, 1862, to be wound up, even if the order would produce nothing for the unsecured creditors.

PETITION by judgment creditor for compulsory winding-up order. The company was incorporated on 10 April, 1897, with a nominal capital of 10,000*l.* in 10,000 shares of 1*l.* each. The amount of capital paid up or credited as paid up was 2,507*l.*; 2,507 shares having been issued, seven for cash and 2,500 in part payment of purchase-money to Mr. Alfred Melson. The company was established to take over as a going concern the latter's business of an upholsterer's trimming manufacturer.

The first issue of debentures for 3,000*l.* was made in April, 1897, these being charged on the undertaking and all the property and assets, present and future, of the company, and secured by a trust deed dated 12 April, 1897, comprising the leasehold property, machinery, plant, and undertaking of the company. The 3,000*l.* secured by the first debentures was borrowed from Mr. G. K. Rousby, and he having died and his representatives having called in the money, Mr. Francis Baring-Gould, in 1901, took a transfer of the debentures on the terms of receiving by way of premium from the company a third debenture for 300*l.* In July, 1901, the company borrowed 2,500*l.* on second debentures charged on all the property of the company. Both the second and third debentures were also secured by trust deed. The 2,500*l.* secured by the second debentures was provided as to 1,100*l.* by Mr. Baring-Gould, and as to

the remaining 1,400*l.* by Mr. Seal, the solicitor of the company. Between May and August, 1905, the company ordered from the Bradford Dyers' Association goods and work to the value of 98*l.* 9*s.* 8*d.*, and on 1 December, 1905, the association obtained judgment in the King's Bench Division against the company for 98*l.* 15*s.* 8*d.* In March, 1906, the company borrowed a further 1,000*l.* from Mr. Baring-Gould and Mr. H. K. Paxton on the security of prior lien debentures.

The balance-sheet of the company prepared in December, 1905, showed assets to the extent of nearly 9,800*l.*, but this included an item of 3,387*l.* 18*s.* 8*d.* entitled "Overdraft of Mr. Melson." The accounts of the company in January, 1906, showed gross trading profits of 1,124*l.*

The Bradford Dyers' Association presented this petition in April, 1906, their judgment remaining unsatisfied. The solicitor of the company had filed an affidavit to the effect that the company possessed no property or assets unpledged to the debenture-holders, and that the continuance of the business presented the only chance of the unsecured creditors being paid, since there would be nothing for them on a winding-up.

The outstanding debenture debt amounted to 6,500*l.* No receiver had been appointed, and it was alleged that the debenture-holders had abstained from appointing one out of regard for the interests of the unsecured creditors.

The petition alleged that the company was insolvent and unable to pay its debts, but that it was impossible without proper investigation to say whether there would be a surplus of assets after satisfying any proper claims of the debenture-holders. No other unsecured creditor appeared to support or oppose the petition.

Buckmaster, K.C., and Ashton Cross, for the petitioners:

In view of the facts, the company ought not to be allowed to continue trading. The case is an even stronger one than *In re "Chic," Limited* [1905] (1), where a winding-up order was made in the circumstances of the case, although it was impossible for the petitioners to show that there would be any surplus assets, or that

(1) 12 Maneon, 342; [1905] 2 Ch. 345; 74 L. J. Ch. 597; 93 L. T. 301; 53 W. R. 659.

they would get anything from a winding-up. The business is simply being carried on by the debenture-holders, who are three individuals, in the name of the company. They are incurring debts for which the creditors will be unable to obtain payment, and, whether the debentures exceed the assets or not, such a state of things ought not to continue.

A. R. Kirby, for the company:

The company is at all events making trade profits, if not actual profits, and ought to be allowed to continue its business for a time in order to see whether it cannot improve its position. The circumstances of *In re "Chic," Limited* (1), were very special: the assets of the company were very small, and the business was being carried on by the receiver. In the present case no receiver has been appointed, and there is no ground for winding up the company at the present time. The petitioning creditors will merely wreck the company if the order is made, and will get absolutely nothing for themselves, for the debentures will exhaust the assets. The wishes of the other creditors ought to be ascertained, and the petition should stand over for that purpose.

Buckmaster, K.C., in reply:

The rule that a petitioning creditor must show that he will obtain something from a winding-up was laid down in *In re Chapel House Colliery Co.* [1883] (2), decided under different circumstances. There is no case in which a winding-up order has been refused in such a state of facts as exists in the present case.

BUCKLEY, J. This is a company which has a paid-up capital of 2,507*l.*, and a debt upon debentures which constitute a charge upon its undertaking and all its assets to the amount of 6,500*l.* The petitioners are creditors for a sum of 98*l. 15s. 3d.*, in respect of which they recovered judgment against the company on 1 December, 1905. Of the debenture debt 1,000*l.* was borrowed upon the security of prior lien debentures in March, 1906, that is to say, after the date on which the judgment had been obtained. The company say that if I make a winding-up order there will be nothing to wind up, as the debentures will more than exhaust the assets of the

(2) 24 Ch. D. 259; 52 L. J. Ch. 934; 49 L. T. 575; 31 W. R. 293.

company. I will for the moment assume that to be the fact, and see how the matter then stands. If that be the fact, it seems to me that upon the evidence in the case the company is not really and in substance carrying on business at all, but the business is being carried on by or for the debenture-holders. The company's name is used, but while the goods are ordered and the debts incurred in the company's name, the debenture-holders are put in a position to avail themselves of the law to which I called attention in *In re London Pressed Hinge Co., Campbell v. Company* [1905] (3). The company (for it is nominally the company) orders goods and does not pay for them. When the creditor seeks to enforce payment the debenture-holders can at any moment intervene by the appointment of a receiver, take the goods for which payment has not been made, and leave the person who supplied them unpaid. That seems to me a state of things which ought not to be allowed. In the case of *In re St. Thomas Dock Co.* (4), decided by Sir GEORGE JESSEL, M.R., in 1876, and in *In re Chapel House Colliery Co.* (2), decided by the Court of Appeal in 1883, the principle was adopted that a creditor who comes for a winding-up-order must in general show that there is some expectation of obtaining payment of something under the order when other creditors oppose the petition and ask that the company may be allowed to go on. But those cases were decided before debentures had reached their modern development. Moreover, I do not think it was ever laid down that, as between the petitioning creditor and the company, the Court was bound at the instance of the company, as distinguished from other creditors of the company, to refuse the order on the ground that it will not be fruitful. What was decided was that there was a discretion in the Court that the petitioning creditor was not, as between himself and other creditors, entitled to an order *ex debito justitiae*; and that the Court in dealing with the matter ought under section 91 of the Companies Act, 1862, to regard the wishes of other creditors, and might refuse the order although the creditor is unpaid. I do not think there exists in those cases anything which obliges me to say, particularly in the

(3) 12 Manson, 219; [1905] 1 Ch. 576; 74 L. J. Ch. 321; 92 L. T. 409; 53 W. R. 407; 21 T. L. R. 322.

(4) 2 Ch. D. 116; 45 L. J. Ch. 304.

modern state of facts as regards debentures, that the Court is bound to exercise its discretion by refusing at the instance of the company to make the order merely upon the ground that the order will produce nothing for the unsecured creditors. That would be to affirm the proposition that the company has used this petitioning creditor so ill as that it ought to be allowed to continue business and create future unsecured creditors who shall be in like position. I think that under the "just and equitable" clause of section 79 of the Companies Act, 1862, I am entitled to say that a company conducted under such circumstances ought not to go on, and that there ought to be a winding-up order.

Moreover, although counsel for the company says that the company has no surplus assets for the unsecured creditors, I am not satisfied on the facts that that is the true state of the case. Upon its balance-sheet of December, 1905, there are shown assets to the extent of nearly 9,900*l.*, and debentures to the extent of over 5,000*l.* The further prior lien debenture debt of 1,000*l.* has arisen since that date. Unless a particular item, "Overdraft of Mr. Melson, 3,387*l.*," is bad (and there is no evidence that it is bad), there would be or may be assets for payment of something to the unsecured creditors. The evidence that there is not sufficient is to be found only in certain paragraphs of Mr. Seal's affidavit. I am not satisfied that the order need be barren.

The debentures are held as follows: a Mr. Baring-Gould holds 2,700*l.* first debentures, 1,100*l.* second debentures, 800*l.* third debentures, and 500*l.* prior lien debentures; 500*l.* prior lien debentures are held by Mr. Paxton; and 1,400*l.* second debentures are held by Mr. Seal, the solicitor of the company. The persons for whom this company is carried on are really Mr. Baring-Gould with (to a much smaller extent) Mr. Paxton and Mr. Seal, though whether Mr. Seal holds in his own right I do not know. The persons substantially carrying on the business are not the company, but these persons. In this state of facts I think the order ought to be made; and I therefore make the usual winding-up order.

Solicitors: *Wynne-Baxter & Keeble*, agents for *Banks, Newell & Hammond*, Bradford, for the Petitioners.
S. S. Seal, for the Company.

IN RE PERTH ELECTRIC TRAMWAYS, LIMITED,
LYONS v. TRAMWAYS SYNDICATE.

1906, May 10. SWINFEN EADY, J.

Company—Debentures—Loan—Blank Debentures Deposited as Security—“Issue”—Equitable Security—Loan Repaid and Debentures Returned to the Company—Reissue of Debentures.

A company issued debentures as a second charge on the property of the company. Twenty-one debentures were sealed in blank—that is to say, without the insertion of any name as the creditor of the company, or of any date—and were deposited with a bank as security for a loan. The loan was afterwards paid off by the company, whereupon the bank returned the debentures to the company.

Subsequently the company filled in six of these debentures with the date and with the name of a syndicate, and issued them to the syndicate for value. The company claimed to be entitled to issue the remaining fifteen in a similar manner. The company had no power to reissue debentures which had been paid off:

Held, that, the bank, having advanced money on the security of the debentures, was entitled to be placed in the position of a secured creditor, and there being in effect a contract by the company to issue the debentures to the bank by way of security, that in the view of equity amounted to an issue of them.

The decision in *In re W. Tasker and Sons, Limited, Hoare v. W. Tasker and Sons, Limited* (1), was therefore applicable to the case, and none of the twenty-one debentures could be validly reissued, but must be cancelled.

SPECIAL CASE.

By a debenture trust deed dated 30 December, 1900, the Perth Electric Tramways, Limited, assigned to trustees for the debenture-holders the assets and property of the company (subject to certain prior trust deeds for securing a sum of 200,000*l.* first debenture stock) to secure a series of 500 second debentures of 100*l.* each to be issued by the company.

Clause 25 of this deed provided that these debentures should be a charge on the mortgaged property next after the existing first debenture stock, and that these second debentures should take precedence of all moneys thereafter to be raised by the company.

Clause 42 of the deed made provision for a sinking fund for the redemption of this issue of second debentures. The debentures so

(1) 12 Manson, 302; [1905] 2 Ch. 587; 74 L. J. Ch. 643; 93 L. T. 195; 54 W. R. 65; 21 T. L. R. 736.

196 IN RE PERTH ELECTRIC TRAMWAYS, LTD., [MANSON,
repaid, whether by purchase or drawings, were to be cancelled, and
the company was not to be at liberty to reissue them.

The form of the debentures was set out in the first schedule to the debenture trust deed, and it appeared that each of the debentures was to be issued under seal to a person to be specified therein as a creditor for 100*l.*, and as the person to whom or to other the registered holder thereof payment was to be made by the company.

One of the conditions to be indorsed on such debenture provided that a register of the debentures should be kept at the company's registered offices, wherein should be entered the names, addresses, and descriptions of the registered holders.

A number of these debentures were duly issued by the company, but the only question in these proceedings was as to twenty-one debentures which were deposited with the Union Bank of Scotland, Limited, under the following circumstances. At a meeting of the directors of the company on 22 June, 1905, "it was resolved that a loan of 2,000*l.* be obtained from the company's bankers, the Union Bank of Scotland, Limited, on the security of 2,100*l.* of second debentures," and any two directors were authorised to sign and seal the said debentures. Accordingly, at a meeting on 28 June, 1905, twenty-one second debentures of 100*l.* were signed and sealed. By arrangement with the bank these twenty-one debentures were sealed in blank—that is to say, without the insertion of any name as the creditor of the company, and also without the insertion of any date. The debentures were not registered in the name of the bank or of any other corporation or person, but on or about 28 June, 1905, they were deposited with the bank, which thereupon made an advance of 2,000*l.* to the company on the security of such deposit.

On 30 August, 1905, the company repaid to the bank the advance of 2,000*l.*, and the bank returned the twenty-one debentures to the company. In September, 1905, the defendants, the Tramways Syndicate, Limited, agreed to take up and purchase six of the series of 500 second debentures. Thereupon the company filled in the name of the syndicate and the date on six of the twenty-one debentures which had been returned to them by the bank, and issued them to the syndicate for value. They also registered the syndicate as the registered holder of these six debentures.

The syndicate had no reason to suppose that the delivery of the six debentures to them was not the first dealing with them.

The remaining fifteen of the twenty-one debentures were still in the possession of the company, but the company claimed the right to issue these debentures for value in the same way as they had already issued the other six debentures.

The plaintiff, who was a registered holder of one of the other second debentures, contended that the deposit of the twenty-one debentures with the bank to secure a loan amounted to an issue of those debentures, and that these debentures, having served their purpose, could not be validly reissued by the company, but must be cancelled.

Gore-Browne, K.C., and Sargant, for the plaintiff:

The only real distinction between this case and *In re W. Tasker and Sons, Limited, Hoare v. W. Tasker and Sons, Limited* [1905] (1), is that here the debentures deposited to secure the loan were not completed when deposited with the bank, but merely sealed in blank. It will be argued that the debentures as deposited with the bank were not valid, and that they have therefore never been issued. There has been what amounts to an issue. The bank, having advanced 2,000*l.* on the security of the debentures, had a right to that security, and, until the loan was repaid, could at any time have insisted on the company taking all necessary steps to make a valid issue of the debentures to them. There was in effect an agreement to deposit the debentures to secure the loan, and that is an agreement to which full effect will be given : *In re Strand Music Hall Co.* [1865] (2). The bank had the equitable security of the debentures, and the debentures were no longer under the company's control.

"Issued" is not a technical term, but a mercantile term which is well understood, and here means delivery over to the person who has the charge : *Levy v. Abercorris Slate and Slab Co.* [1887] (3). Within that meaning the twenty-one debentures were issued, and, if that be so, *In re W. Tasker and Sons, Limited* (1), is an authority for the proposition that they cannot be reissued.

(2) 3 De G. J. & S. 147; 13 L. T. 177; 14 W. R. 6.

(3) 37 Ch. D. 260, 264; 57 L. J. Ch. 202, 205; 58 L. T. 218; 36 W. R. 411.

P. F. Wheeler, for the company:

There was never an issue of the debentures to the bank which could affect the right of the company to issue the debentures when they returned into the company's possession. The plaintiff is asking the Court to make a dangerous extension of *In re W. Tasker and Sons, Limited* (1). There is nothing in the debentures as issued to the syndicate to show that they were not being issued for the first time, and no issue to the bank had ever been registered. To hold under such circumstances that a holder for value had not properly acquired the debentures would be to open the door to fraud.

The debentures when handed to the bank were void: *Hibble-white v. M'Morine* [1840] (4) and *Société Générale de Paris v. Walker* [1885] (5). No doubt the deposit of the blank debentures was evidence of an agreement to issue debentures in proper form to secure the advance by the bank, and the bank would have been entitled to be placed in the position of a secured creditor. There is nothing in that amounting to an issue of debentures. Although the bank had an equitable right to call for the issue of the debentures to them, they were never in fact issued. Until there is a registered holder of debentures they have not been issued.

The syndicate did not appear.

SWINFEN EADY, J.: No separate point is raised with regard to the six debentures held by the syndicate, but the sole question is whether the company have power to issue the twenty-one debentures which were deposited with their bankers. The company claim that these debentures never were issued to the bank, and that the first issue of the six debentures was to the syndicate, while the remaining fifteen have never yet been issued, but can be issued at any time by the company. The short point, therefore, to be determined on the special case is whether the transaction with the bank amounted to an issue of the twenty-one debentures within the meaning of the debenture trust deed so that they were spent and cannot be reissued.

(4) 6 M. & W. 200; 9 L. J. Ex. 217; 2 Ry. Cas. 51.

(5) 11 App. Cas. 20; 55 L. J. Q. B. 169; 54 L. T. 389; 34 W. R. 662.

Now it was pointed out by Mr. Justice CHITTY in *Lery v. Abercrombie Slate and Slab Co.* (3) that “‘issued’ is not a technical term: it is a mercantile term well understood; ‘issue’ here means the delivery over by the company to the person who has the charge.” The question is whether, within this meaning, there has been an issue to the bank of the twenty-one debentures. Now I will consider the position of the bank. There was a resolution on 22 June, 1905, by the directors of the company to borrow 2,000*l.* from the bank on the security of 2,100*l.* second debentures. Then there was a meeting on 28 June, 1905, when twenty-one second debenture bonds were signed and sealed in accordance with the previous resolution. These bonds were left blank as to date and name, and these twenty-one sealed pieces of paper were deposited with the bank. To my mind, it is clear that this gave the bank an equitable charge. There was an agreement that the bank on advancing the 2,000*l.* should have the security of the twenty-one debentures, and in equity that gave the bank an equitable charge. If the bank had not been repaid the loan, and the company had gone into liquidation, the bank would have been entitled to prove as a secured creditor and to receive a dividend on the whole nominal amount of the debentures. The bank had a valid equitable right to those debentures. The language used by Lord Justice STIRLING in *In re W. Tasker and Sons, Limited* (1), is equally applicable to the present case: “If no repayment had been made to” (in this case the bank), “and the debentures had remained in their hands, they would have been entitled to prove in the action and to receive dividends on the full nominal amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *In re Regent’s Canal Ironworks Co.* [1876] (6). It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect.” If a company may deposit debentures validly issued in this way, they may equally agree so to do, and *In re Strand Music Hall Co., Limited* (2), shows that full effect will be

(6) 3 Ch. D. 43; 45 L. J. Ch. 360; 35 L. T. 288; 24 W. R. 687.

given to such an agreement. As Mr. Justice BUCKLEY said in *In re George Routledge and Sons, Limited, Hummell v. George Routledge and Sons, Limited* [1904] (7), "if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it." There was a contract here to give these twenty-one debentures to the bank as a security, and that amounted to a valid contract to issue the debentures. Equity regards as done what ought to be done, and consequently there was in this case what amounted to an issue of the twenty-one debentures. There was a valid contract that the company would issue the debentures to the bank, and the company could have issued them to no one else. The debentures have been issued or agreed to be issued for a loan; and although the loan was of a temporary character, the debentures have served their purpose. As the company has no power to re-issue debentures, they cannot deal further with any of these twenty-one debentures. The fifteen debentures which are in the possession of the bank must be cancelled, and the six already issued to the syndicate have not been validly issued.

In my opinion, this result follows from the decision in *In re George Routledge and Sons, Limited* (7), *In re W. Tasker and Sons, Limited* (1), and *In re Strand Music Hall Co., Limited* (2).

The plaintiff is entitled to prevent the company from reissuing any of the fifteen debentures still in their hands.

Solicitors: *Burn & Berridge*, for the Plaintiff.

H. C. Godfray, for the Company.

(7) [1904] 2 Ch. 474, 480; 73 L. J. Ch. 843, 846; 91 L. T. 288; 53 W. R. 44.

IN RE MELLISON, EX PARTE DAY.

1906, April 2. BIGHAM AND WALTON, JJ.

Bankruptcy—Administration of Estate of Deceased Insolvent—Disclaimer of Lease—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 55 and 125.

Section 55 of the Bankruptcy Act, 1883, which gives power to the trustee in bankruptcy to disclaim onerous property, applies to administrations in bankruptcy under section 125.

Dictum of CAVE, J., in In re Gould, Ex parte Official Receiver (1), followed.

APPEAL from the County Court for Sussex holden at Brighton giving the Official Receiver in the administration of the estate of a deceased insolvent leave to disclaim a lease.

The lease in question was granted by one Isaacs to the deceased Mellison, who had sublet to a Mrs. Morse, who had in her turn assigned to the appellant Day. Mellison having died insolvent, an order was made under section 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy in the County Court at Brighton. The Official Receiver, as trustee of the estate, applied to the Registrar for leave to disclaim the lease from Isaacs to the deceased under section 55 of the Bankruptcy Act, 1883. Day opposed the application on the ground that the Court had no jurisdiction to give leave to disclaim in administrations in bankruptcy under section 125 (2).

The Registrar held that he had jurisdiction and gave leave to disclaim, relying upon *Hasluck v. Clark* [1899] (3), and the *dictum* of CAVE, J., in *In re Gould, Ex parte Official Receiver* [1887] (1).

Day appealed.

(1) 4 Morr. 202; 19 Q. B. D. 92, 95; 56 L. J. K. B. 333, 335; 56 L. T. 806; 35 W. R. 569.

(2) The Bankruptcy Act, 1883, s. 125, provides:—

Sub-section 5: "Upon an order being made for the administration of a deceased debtor's estate the property of the debtor shall vest in the Official Receiver of the Court, as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act."

(3) 6 Manson, 146; [1899] 1 Q. B. 699; 68 L. J. Q. B. 486; 80 L. T. 454; 47 W. R. 471.

Sub-section 6: "With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

Herbert Reed, K.C., and W. O. Hedges, for the appellant:

The Court of Bankruptcy will follow the practice of the Chancery Division in administration actions: *In re Crowther, Ex parte Ellis* [1887] (4). The Judicature Act, 1875, section 10, did not import disclaimer into administrations in Chancery: *In re Westbourne Grove Drapery Co.* [1877] (5). There is no direct authority on this point, but there is a *dictum* of CAVE, J., in *In re Gould, Ex parte Official Receiver* (1), when, referring to sections 50—57 and 58—65, he said, "Speaking generally, there can, I think, be no doubt that the last two portions apply to an administration under section 125, though even in those portions there are sections, such as 52 and 64, which would not be applicable." The Registrar also relied upon *Hasluck v. Clark* (3). Section 55 refers to the property of "the bankrupt" and the liabilities of "the bankrupt." But in an administration under section 125 there is no bankrupt. The section also refers to "the date when the bankruptcy petition was filed," and in administration there is no such date.

[They also referred to *In re Withernsea Brickworks* [1880] (6).]

Humphrys, for the Official Receiver:

The rules of bankruptcy are to be applied in administration of assets: *In re D'Epineuil* [1882] (7). The lease being vested in the Official Receiver, he is entitled to deal with it in accordance with the provisions of the Act, and has therefore a right to disclaim.

E. Clayton, for the lessor.

BIGHAM, J.: The only point now before us in this case is whether in administrations in bankruptcy of the estates of persons dying insolvent there is jurisdiction to allow the disclaimer of a lease. I see no reason why there should not be. The lease which was granted to the deceased was undoubtedly part of his estate. By sub-section 5 of section 125 of the Bankruptcy Act, 1889, it is provided that, upon an order being made for the administration of a

(4) 4 Morr. 305; 20 Q. B. D. 38; 57 L. J. Q. B. 57; 58 L. T. 115; 36 W. R. 189.

(5) 5 Ch. D. 248; 46 L. J. Ch. 525; 36 L. T. 439; 25 W. R. 509.

(6) 16 Ch. D. 337; 50 L. J. Ch. 185; 43 L. T. 713; 29 W. R. 178.

(7) 20 Ch. D. 217; 51 L. J. Ch. 491; 46 L. T. 409; 30 W. R. 423.

deceased debtor's estate, the property of the debtor shall vest in the Official Receiver of the Court as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of the Act. An administration order was made under that section, and the effect of that order was to vest the lease in question in the Official Receiver. Then sub-section 6 provides that with certain modifications the provisions of the Act relating to the administration of the property of a bankrupt shall so far as applicable apply to an administration order under this section. I see no reason why the Official Receiver under this section should not have the rights and powers of an ordinary trustee in bankruptcy. In the cases referred to of *In re Gould, Ex parte Official Receiver* (1), and *Hasluck v. Clark* (8), the property was not the property of the debtor, and the Court held that sections 45 and 47 did not apply to an administration order, because those sections dealt with the property of third persons. But here the lease was part of the debtor's estate, and as soon as it vested in the Official Receiver under section 125 he had the rights of a trustee in bankruptcy, one of which was the right to disclaim onerous property. I base my judgment on the reasons given by the Registrar. It is not correct to say that there is no authority on the point. It seems to me that the *dictum* of Mr. Justice CAVE in *In re Gould, Ex parte Official Receiver* (1), is an authority for holding, as I do, that the Court has jurisdiction to give the leave to disclaim asked for on this application.

WALTON, J.: I am of the same opinion. It is clear that the lease vested in the Official Receiver, and it so vested for the purpose of being administered in accordance with the provisions of the Bankruptcy Act, 1883. It was intended that the lease should be dealt with in the administration, and I see no reason why it should not be dealt with under section 55, which in my opinion applies to administrations under section 125.

Appeal dismissed. Leave to appeal granted.

Solicitors : *R. W. Beckwith*, for Appellant.

Cushman & Clifton, Brighton, for Official Receiver.

Hyman Isaacs & Lewis, for Lessor.

IN RE GARNER, EX PARTE PEDLEY.

1906, May 28. BIGHAM, J.

Bankruptcy—Practice—Costs—Sale by Trustee of Mortgaged Property—Proceeds of Sale—Duty of Taxing Officer—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), General Order, Sched. 1—Bankruptcy Rules, 1886, Appendix, Part II., General Regulations, r. 2.

In a taxation of a solicitor's costs under r. 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886, the Taxing Master in Bankruptcy is not concerned to determine out of what fund the taxed costs are to be paid. His duty is to tax the bill in accordance with the General Order under the Solicitors' Remuneration Act, 1881, and he should then direct by his allocatur that the amount of the bill as taxed is to be paid in accordance with the above-mentioned rule. It will be for the parties to determine out of what fund the costs are to be paid.

Semblé, where mortgaged property is sold, the words "proceeds of sale" in the proviso of the above-mentioned rule mean the net proceeds of sale after the charges on the property have been paid off.

APPEAL from the decision of the Taxing Master in Bankruptcy.

The debtor, John Garner, who was adjudicated bankrupt in the County Court at Crewe, was at the time of his bankruptcy the owner of a number of different properties in Crewe. These properties were severally subject to first mortgages, and they were also subject to a second mortgage on the whole of them. The properties were estimated to be worth about 14,000*l.*, and there was, according to the debtor's statement of affairs, a surplus of about 3,000*l.* over and above all the mortgages.

The trustee in bankruptcy sold three of the properties separately for sums which were employed in paying off the first mortgages on the properties sold, and also in discharging a considerable part of the second mortgage. Besides this, a small sum of 1*l.* 9*s.* 11*d.* was paid to the trustee.

Mr. Pedley was the solicitor employed by the trustee to carry out the sales, and his bill of costs in relation thereto was taxed by the Registrar of the County Court under the Solicitors' Remuneration Act, 1881, and allowed at a sum of 16*l.* 10*s.* At the request of the Board of Trade, this taxation was reviewed by the Taxing Master in Bankruptcy under rule 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886 (1); and the Taxing

(1) R. 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886, provides: "In respect of business connected with

Master taxed off a sum of 15*l.* 0*s.* 1*d.*, reducing the bill to 1*l.* 9*s.* 11*d.* He did this on the ground that the solicitor was "payable only out of the proceeds of sale," which, so far as the trustee was concerned, amounted in this case only to 1*l.* 9*s.* 11*d.*

Mr. Pedley appeared against this decision.

Hughes, K.C., and Redman, for the appellant:

It is not the concern of the Taxing Master whether there are or are not "proceeds of sale" out of which the solicitor's bill will be payable. His duty is simply to tax the bill. Moreover, the words "proceeds of sale" mean, in a case like the present, the ultimate surplus remaining after all the properties have been sold and all the mortgages paid off. When this has been done, there will be a considerable sum available to pay costs. There is no direct decision on the point; but the words of the rule were considered in *In re Gallard, Ex parte Harris* [1888] (2). If the appellant's contention on this point is wrong, then it will be further contended that the proviso in the rule is *ultra vires*.

[BIGHAM, J.: I will consider your objections separately. If you are right in saying that the Taxing Master's sole duty is to tax, it will not be necessary for me to consider the further points.]

As to that point, the Taxing Master is not concerned to see from what fund the solicitor's bill is payable. He must determine what are the proper charges for the work done by the solicitor. The proper charges in this case are 16*l.* 10*s.* It will then lie with the trustee to see out of what fund he can pay these taxed costs.

sales, purchases, leases, mortgages, and other matters of conveyancing, and in respect of other business not being business transacted in Court or in chambers, and not being otherwise contentious business, the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitors' Remuneration Act, 1881, for the time being in force:

provided, that, in cases of sales of mortgaged properties, the trustees' solicitor, if his remuneration shall be under Sched. 1 of the existing Order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagees' solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale."

(2) 5 Morr. 123; 21 Q. B. D. 38, 41; 57 L. J. Q. B. 528; 59 L. T. 147; 36 W. R. 592.

Hansell, for the Board of Trade :

The whole object of taxation in bankruptcy is to determine what sum is payable out of the bankrupt's estate. This is clear from section 78 of the Bankruptcy Act, 1883, and rules 112—115 of the Bankruptcy Rules, 1886. By his allocatur the Taxing Master certifies not only that he has taxed the bill, but also that he has "allowed the same at the sum of —l." The word "allowed" means allowed out of the bankrupt's estate. Consequently the Taxing Master was right to have regard to rule 2 and to cut down the costs which he allowed to the amount of the net proceeds of sale. Once the full amount of the percentage was allowed, the solicitor could get payment out of the bankrupt's estate.

BIGHAM, J.: I think that in such a case as this the duty of the Taxing Master is to tax the solicitor's bill in accordance with the General Order under the Solicitors' Remuneration Act, 1881, and in order to see what the percentage is to which the solicitor is entitled he must have regard to the schedule to that Order. Then, having taxed the bill in that way, he ought, in giving his allocatur, to state that the amount of the taxed costs is only to be paid in accordance with the provisions of rule 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886, leaving the parties to ascertain whether there are any proceeds of sale within the meaning of that rule out of which the costs are payable. Thus his allocatur will consist of the following statement: "I hereby certify that I have taxed the bill of costs of Mr. C. D."; and then it will go on: "and the amount is to be paid in accordance with rule 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886."

The ordinary form of allocatur (Form 141 of Part I. of the Appendix to the Bankruptcy Rules, 1886) is: "I hereby certify that I have taxed the bill of costs of Mr. C. D., and have allowed the same at the sum of —l." I suggest that the allocatur should be altered in the way I have mentioned, because I am told that, if the allocatur goes in the ordinary form, it might be considered to amount to a direction that the costs were to be paid out of the general estate of the bankrupt.

It is not the Taxing Master's business to ascertain whether there

is a fund under the General Regulations out of which the costs can be paid. If the parties cannot agree between themselves whether there is a fund within the meaning of that rule, they must come to the Court to determine the question.

By the rule the costs are only payable out of the "proceeds of sale." It is not now necessary for me to decide the meaning of the expression, but in my opinion, having regard to Mr. Justice CAVE's decision in *In re Gallard, Ex parte Harris* (2), I think the words mean what is left after paying the charges upon the fund—in this case the first and second mortgages.

I do not think that there is, at present, any fund out of which the trustee's solicitor can get paid, although there may be later on.

Solicitors : *Woosnam & Smith*, agents for *C. H. Pedley*, Crewe,
for Appellants ;
Solicitor to Board of Trade, for Board of Trade.

BRADFIELD v. CHELTENHAM GUARDIANS.

1906, June 15. BUCKLEY, J.

Bankruptcy—Poor Law—Guardian—Disqualification for Office—Composition or Arrangement with Creditors—Administration Order of County Court for Partial Payment of Debts—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1 (c).

Section 46, sub-section 1 (c), of the Local Government Act, 1894, which provides that a person shall be disqualified for being a parish or district councillor or guardian if he has made a composition or arrangement with his creditors, applies to every composition, howsoever made, which the debtor has made with his creditors. A guardian, against whom a judgment had been recovered in a County Court, preferred to that Court a request under section 122 of the Bankruptcy Act, 1883, for an order for the administration of his estate and the payment of his debts, and stated that he proposed to pay 10s. in the pound. The Court made an order for the payment of his debts to that extent :—

Held, that he had made a composition with his creditors, and was therefore disqualified for being a guardian.

MOTION.

In March, 1904, Mr. George Bradfield was duly elected a guardian of the poor for the north ward of the borough of

Cheltenham, to hold office for a period of three years from that date.

A judgment was subsequently obtained against him in the Cheltenham County Court; and on 1 December, 1905, he preferred to that Court a request that the Court would make an order under section 122 of the Bankruptcy Act, 1883 (1), for the administration of his estate and the payment of his debts. He stated in his request that his whole indebtedness amounted to 44*l.*, and that he proposed to pay his debts to the extent of 10*s.* in the pound.

The Court thereupon made an order under section 122 for the payment of his debts, as specified in the schedule to the request, to the extent of 10*s.* in the pound, by instalments of 8*s.* per month.

(1) Bankruptcy Act, 1883, s. 122, sub-s. 1: "Where a judgment has been obtained in a County Court, and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding fifty pounds, inclusive of the debt for which the judgment is obtained, the County Court may make an order providing for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the County Court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just."

Sub-section 5: "When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court, except with the leave of that County Court, and on such terms as that Court may impose. . . ."

Sub-section 7: "The order shall be carried into effect in such manner as may be prescribed by general rules."

Sub-section 10: "Any creditor of the debtor, on proof of his debt before the Registrar, shall be entitled to be scheduled as a creditor of the debtor

for the amount of his proof."

Sub-section 11: "Any creditor may in the prescribed manner object to . . . the manner in which payment is directed to be made by instalments."

Sub-section 13: "When the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and the costs of the plaintiff and of the administration, the order shall be superseded, and the debtor shall be discharged from his debts to the scheduled creditors."

General rules under the above section were made in December, 1888. Rule 2: "A debtor against whom a judgment has been obtained in a County Court, and who desires to obtain an administration order under section 122 of the Act, shall file with the Registrar of the Court a request and statement in writing in the form No. 1 in the Appendix. . . ." Rule 3 (1): "The debtor shall state in his request whether he proposes to pay his creditors in full, or whether he proposes to pay a composition. In the latter case he shall further state the amount in the pound which he proposes to pay, and in either case he shall state the amount of the monthly or other instalments by which he proposes to pay."

One of the creditors, who was also a guardian, objected to the composition offered, and opposed the making of the order, and on its being made he gave notice to the clerk to the guardians that by reason of it Mr. Bradfield was disqualified under section 46, sub-section 1, of the Local Government Act, 1894 (2), for holding the office of guardian.

In January, 1906, the clerk gave Mr. Bradfield written notice that the guardians proposed to take steps with a view to declaring his seat vacant; and on 15 January, 1906, the following resolution was duly carried at a meeting of the board : "That, as Mr. George Bradfield has become disqualified for holding the office of guardian for the north ward of the parish of Cheltenham by reason of having made a composition or arrangement with his creditors (through his having been granted an administration order under the Bankruptcy Act, 1883, s. 122, providing for the payment of his debts to the extent of 10s. in the pound by instalments of 8s. per month), we, the Board of Guardians for the Cheltenham Union, in pursuance of the Local Government Act, 1894, s. 46, sub-s. (1) (c), do now declare the office of guardian lately held by the said Mr. George Bradfield to be vacant."

A notice was afterwards duly signed by three guardians and countersigned by the clerk declaring Mr. Bradfield's office of guardian to be vacant, and the declaration was notified on 22 February, 1906, by being affixed on the notice-board at the workhouse door and by being sent to Mr. Bradfield.

On 29 March the vacancy was formally certified at a board meeting, and on 18 April an election to fill the vacancy was held. On the same day Mr. Bradfield commenced an action against the guardians claiming a declaration that he was not disqualified for

(2) Local Government Act, 1894, s. 46, sub-s. 1 : "A person shall be disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or of a board of guardians if he . . . (c) has, within five years before his election or since his election, . . . been adjudged bankrupt, or made a composition or arrangement with his creditors."

Sub-section 7 : "Where a member of a council or board of guardians becomes disqualified for holding office, . . . the council or board shall forthwith declare the office to be vacant, and signify the same by notice signed by three members and countersigned by the clerk of the council or board, and notified in such manner as the council or board direct, and the office shall thereupon become vacant."

holding or exercising the office of guardian of the poor or for being a member of the defendant board of guardians, and an injunction to restrain the defendants, their servants and agents, from interfering with him in the exercise of his office of guardian.

He now moved for an injunction in those terms. The motion was treated as being the trial of action, and the facts were embodied in an affidavit agreed between the parties.

Corrie Grant, for the plaintiff :

The disqualifications of composition or arrangement with creditors, to which section 46 of the Local Government Act specifically refers, are dealt with in an earlier portion—section 18—of the Bankruptcy Act, 1883, the place of which is now taken by section 3 of the Bankruptcy Act, 1890. The section under which the proceedings in the present case took place—section 122 of the Act of 1883 (1)—is in an entirely different part of the Act. Proceedings under it are also not of the character of a compromise or arrangement with creditors. Those words imply some agreement between the debtor and creditors, under the general supervision only of the Court; proceedings under section 122 are more in the nature of bankruptcy proceedings. They are, however, not mentioned in section 46 of the Local Government Act, 1894, though section 122 had been in existence for over ten years when that Act was passed. They cannot therefore be a disqualification under it. Though there is no express decision on the point, there are authorities which throw some light upon it. The Court cannot raise an inference of an intention to disqualify where such intention is not expressed: *Rex v. Chitty* [1836] (3). Such provisions must be construed according to their plain meaning, without regard to the spirit of the section: *Aslatt v. Southampton Corporation* [1880] (4). And, with regard to the character of proceedings under section 122, it is pointed out in *Reg. v. Cooban* [1886] (5) that a composition is an arrangement under which the debtor gives and the creditors accept something falling short of the full debt; whereas section 122 contemplates that the whole debt may be paid. The section has

(3) 5 Ad. & E. 609; 6 L. J. K. B. 12; 2 H. & W. 399; 1 N. & P. 78.

(4) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117.

(5) 18 Q. B. D. 269; 56 L. J. M. C. 33; 51 J. P. 500.

been considered in the case of *Lowe v. Lowrie* [1902] (6); and although the actual decision there was on the question whether proceedings under it were an adjudication of bankruptcy, PHILLIMORE, J., expresses the opinion that they are not a composition with creditors, since the County Court makes the order.

Macmorran, K.C., and *C. Lacey Smith*, for the defendants :

There is a difference between the language of the disqualifying provisions of the Local Government Act, 1894, and those of the Debtors Act, 1869, and the Municipal Corporation Act, under which *Aslatt v. Southampton Corporation* (4) was decided. The disqualifying provisions in those statutes were more precise than those in section 46 of the Local Government Act, 1894, which are more general in character. They do not specify any particular mode of composition. Section 122 of the Bankruptcy Act and the Rules made under it contemplate an application by the debtor to the Court; and the proceeding is therefore just as much a composition by him with his creditors as if he called his creditors together outside the Court and made a proposal to them. The disqualification of composition or arrangement with creditors under section 46 of the Local Government Act, 1894, has been held by the Divisional Court in Ireland to extend to compositions and arrangements under the Deeds of Arrangement Act, 1887, and not to be limited to those made under the Bankruptcy Acts: *Corrigan v. Allison* [1900] (7). PHILLIMORE, J.'s opinion in *Lowe v. Lowrie* (6), that proceedings under section 122 of the Bankruptcy Act are not a composition, was by way of *dictum* only, and it is submitted that it was not well founded.

BUCKLEY, J.: The plaintiff on 1 December, 1905, preferred at the Cheltenham County Court a request that an order should be made under section 122 of the Bankruptcy Act, 1889, for the administration of his estate, and stated in his request that he proposed to pay his debts to the extent of 10s. in the pound. On that request the County Court Judge made an order on 1 December, as asked. The question for my decision is whether under those

(6) 18 T. L. R. 553.

(7) 64 J. P. 678.

circumstances the plaintiff is a person who has made a composition or arrangement with his creditors within the language of section 46, sub-section 1 (c), of the Local Government Act, 1894.

Now, no doubt, in the words of Lord DENMAN in *Rex v. Chitty* (3), "the Court would clearly not be justified in raising any inference of an intention to disqualify where such an intention is not expressed." I must look to see whether, on the true construction of the Act, the Act has provided that there shall be a disqualification in such a case as this. The clause to be construed is a penal clause, and therefore to be construed strictly; and the question is, Has the debtor made a composition? When I come to look at section 122 of the Bankruptcy Act, 1888, I find that it is a section which enables the County Court, upon an application by the debtor, to make an order providing for the administration of his estate and for the payment of his debts "either in full or to such extent as to the County Court under the circumstances of the case appears practicable"; and sub-section 7 provides that "the order shall be carried into effect in such manner as may be prescribed by general rules." Sub-section 18 provides that when the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and the costs of the administration, the order shall be superseded, and the debtor shall be discharged from his debts to the scheduled creditors. Rules have been made under sub-section 7, the relevant rules being rules 2 and 3 of December, 1888. [His Lordship read the material provisions of those rules, and continued:] Then there are forms which are scheduled to the Rules for the purpose of carrying them into effect. The machinery, therefore, is this: that, the case being shown to be one falling within section 122, the debtor approaches the County Court with the request that the Court will make an order the result of which will be that all his creditors will be bound to take in this case 10s. in the pound in satisfaction of their debts, and when that is done the debtor will be discharged from his debts to the scheduled creditors. Is a person who has availed himself of that machinery a person who has "made a composition or arrangement with his creditors"? It appears to me that he is. He could not make it without the concurrence of the Court, I agree; but he is a person who avails himself of a certain statutory means of

making a composition with his creditors, and he makes the composition by applying to a Court of competent jurisdiction to make at his request an order which by force of the Act of Parliament will bind his creditors to take 10*s.* in the pound. I am not aware—counsel have not been able to show me—that anywhere in the Bankruptcy Act is “composition or arrangement with creditors” defined; and even if it were, the language of the Local Government Act, 1894, is not, as was the language of a previous Act, addressed to compositions or arrangements under the Bankruptcy Act. There are no such words at all. The words of the Act of 1894 are simply that the debtor “has made a composition with his creditors,” which I conceive are words wide enough to cover every composition, howsoever made, which the debtor has made with his creditors. It seems to me that when he approaches the County Court under this section he invokes the jurisdiction which has power to give effect to his request. He thus makes a composition with his creditors.

The decision of the Divisional Court in *Lowe v. Lowrie* (6) was not really a decision on the point which I have to decide; it was a decision on the words “adjudged bankrupt,” and there is nothing in the words of my brother PHILLIMORE at the end of his judgment which binds me on the matter which I have to decide. The matter was not before the Court in that case, and did not arise for decision. I do not find anything in that decision which relieves me from the necessity of deciding the point for myself. I think that there was a composition here with the creditors, and that the plaintiff’s action fails and must be dismissed with costs.

Solicitors: *C. T. Courtney Lewis*, agent for *G. T. Wellington*,
Gloucester, for Plaintiff.

Crowders, Vizard, Oldham & Co., agents for *Ticehursts*,
McIlquham & Wyatt, Cheltenham, for Defendants.

PEARSON *v.* WILCOCK.

1906, May 14, 15. KENNEDY AND A. T. LAWRENCE, JJ.

June 18, 22. C. A. COLLINS, M.R., COZENS-HARDY, L.J., AND GORELL BARNES, P.

Bankruptcy—Administration Order—County Court—Judgment for Debt incurred subsequently to Order—Stay of Execution on Judgment—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122, sub-s. 5.

Section 122, sub-section 5, of the Bankruptcy Act, 1883, which provides that, during the continuance of an administration order, "no creditor shall have any remedy against the person or property of the debtor" in respect of a debt which the debtor has notified to a County Court, "except with the leave of that County Court, and on such terms as that Court may impose," applies to subsequent creditors as well as to creditors before the date of the order. Therefore a creditor whose debt has been incurred after and without notice of the date of the administration order is only entitled to be scheduled as a creditor under the order, unless the Court in its discretion gives him leave to issue execution, or the order has been set aside or rescinded.

In re Frank(1) not followed.

APPEAL from the judgment of the Judge of the Bradford County Court.

In June, 1905, the plaintiff obtained judgment against the defendant in the Bradford County Court for 5*l.* 1*s.* 1*d.* for groceries supplied, which amount was made payable in instalments of 5*s.* a month. The second instalment being unpaid, the plaintiff issued execution for the balance of the judgment, which then became due, but the bailiff did not actually go into possession. The defendant thereupon applied to the County Court Judge to stay execution, on the ground that he had previously obtained an administration order under section 122, sub-section 12, of the Bankruptcy Act, 1883, which had not been set aside or rescinded. The fact of the existence of the administration order had never been communicated and was unknown to the plaintiff. The administration order provided for the payment of 5*s.* in the pound on his debts at the rate of 4*s.* a month, the debts amounting to 35*l.*

The County Court Judge granted the defendant's application for the stay of execution, holding that the plaintiff must prove his debt under the administration order, upon the ground that the provisions

(1) 1 Manson, 23; [1894] 1 Q. B. 9; 69 L. T. 762; 42 W. R. 253; 10 Rep. 80.

of section 122 of the Bankruptcy Act, 1883, were not confined to creditors at the date of the making of the administration order, but that they applied to all creditors, whether their debts accrued due before or after that date; he therefore granted the application, and made an order for a stay of execution.

The plaintiff appealed.

Compston, for the appellant:

The appellant could not be deprived of his right to levy execution, unless section 122, sub-section 12, of the Bankruptcy Act, 1883 (2), or section 153 of the County Courts Act, 1888 (51 & 52 Vict. c. 48) (3), had that effect. The existence of an administration order is not a "sufficient cause" within the meaning of the latter section: *Attenborough v. Henschel* [1895] (4). Section 122, sub-section 5, of the Bankruptcy Act, 1883, only applies to creditors who were such at the time when the order was made; and this is made plain by rules 3 and 7 of the Bankruptcy (Administration Order) Rules, 1902.

(2) Bankruptcy Act, 1883, s. 122, sub-s. 5: "When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court except with the leave of that County Court, and on such terms as that Court may impose; and any County Court or inferior Court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified."

Sub-section 12: "Any person who after the date of the order becomes a creditor of the debtor shall, on proof of his debt before the Registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are

scheduled as having been creditors before the date of the order have been paid to the extent provided by the order."

(3) County Courts Act, 1888, s. 153: "If it shall at any time appear to the satisfaction of the Judge that the defendant in any action or matter is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof, it shall be lawful for the Judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action or matter, for such time and on such terms as the Judge shall think fit, and so from time to time until it shall appear that such cause or inability has ceased, or to order the discharge of any debtor confined in prison by order of a Court who, on account of sickness, insanity, or other sufficient cause, ought, in the opinion of the Judge, to be discharged."

(4) [1895] 1 Q. B. 833; 64 L. J. Q. B. 255; 72 L. T. 192; 43 W. R. 283; 59 J. P. 150; 15 Rep. 294.

Section 122, sub-section 12, of the Bankruptcy Act, 1888 (1), does not provide an exclusive but only an alternative remedy for subsequent creditors if the debtor has no property to seize, or the remedy by commitment cannot be invoked. Having regard to the Bankruptcy (Administration Order) Rules, 1902, rule 15, sub-rule 3, it might be implied that a subsequent creditor was bound by the order, inasmuch as the rule contemplated proceedings being taken by him to set it aside, which he would not desire to do if it did not affect him. The right to issue execution, however, cannot be taken away by a mere inference.

The respondent did not appear.

KENNEDY, J.: I am of opinion that the judgment of the County Court Judge was right.

It was thought by the Legislature important that small debtors who were unable to pay the amount of a judgment debt, and whose indebtedness did not exceed 50*l.*, should have in substance the advantage of the provisions of the Bankruptcy Act, 1888, and that there should be a method of clearing them from the burden of debt when it does not exceed that sum. That object is attained by the debtor, if necessary, giving up what property he has, and by power being given to the Judge to make an order that the debtor out of his future earnings pay instalments at certain intervals for the purpose of liquidating his debts *pari passu*.

That is carried out by the provisions of section 122 of the Bankruptcy Act, 1888. The section is contained in Part VII. of the Act, which is headed "Small Bankruptcies." Having regard to sub-section 5 of section 122, I agree with counsel for the appellant that *prima facie* the section applies to existing creditors; but I am of opinion that it would be taking too narrow a view to confine the application of the section to such creditors, for this cogent reason: that if subsequent creditors could issue execution, while the order made by the Court for the payment of the sum at intervals by the debtor out of his earnings is still in force, it is obvious that it would be impossible in many cases for the debtor to obey the order of the Court where a subsequent creditor, having given him credit, could enforce his rights without any restraining power in the hands of the Court to protect its own order. The Court, while it may, upon

being notified of a subsequent debt, protect the debtor with regard to whom the order has been made from proceedings against his personal property to satisfy the claim of the subsequent creditor, may also give leave to that creditor to proceed to execution or to enforce payment of the debt by means of the powers of the Court. Therefore the Court is empowered to deal with the two classes of creditors equitably. Sub-section 5 of section 122 in effect says, "If you are a subsequent creditor the debt may be notified to the Court, and you will be restrained, unless the Court makes an order in your favour to the contrary." If, for example, the Court found that the debtor had sufficient means to satisfy the subsequent creditor without interfering with the due payment of the instalments ordered under the administration scheme, it could give leave to the creditor to exercise his remedy against the person or property of the debtor. But it is for that creditor to satisfy the Court that he ought to have power to proceed in spite of the pendency of the fulfilment of the administration order. It seems to me that that was in the mind of the Legislature, because sub-section 12 of section 122 would be unnecessary if the creditor could at his own will proceed by execution on his judgment. That sub-section is framed with this view: that, as the subsequent creditor while the administration order is in force cannot, except by the leave of the Court, take a remedy against the person or property of the debtor, while that leave may under certain circumstances be refused, and will be refused if the execution or other remedy is such as would practically prevent the debtor from obeying the terms of the administration order, the subsequent creditor must not be excluded altogether, and therefore the right is given to him to go before the Registrar, prove his debt, and be scheduled as a creditor of the debtor for the amount of his proof, while he is postponed in the payment of dividend until the creditors who were scheduled as having been creditors before the date of the order have been paid to the extent provided by the order. That provision would be useless if it were in the power of the subsequent creditor, as of right, to take his remedy by execution against the person or property of the debtor, and obtain what he could under those powers out of the debtor's earnings or substance. And it seems to me the scheme is fairly reasonable. Somebody does suffer where

there is bankruptcy. The creditor who has to take the smaller sum *pari passu* with other creditors, of course, loses; so a subsequent creditor who has given credit to the debtor without knowledge of the administration order may think it rather hard when he discovers that he has given credit to a person who is under terms of obedience to an administration order. But if he can show that, without that administration order being interfered with, he ought to have a further remedy, the Court may give it. If that is not the case he has the absolute right to go to the Registrar, prove his debt, be scheduled, and come in for payment after those who have a right to be paid under the administration order.

There is nothing in Order 25, rule 42, of the County Court Rules, 1908, which conflicts with that view. Reference has been made to rule 15 of the Bankruptcy (Administration Orders) Rules, 1902, which deals with rescission of administration orders, sub-rule 3 of which provides for rescission where the debtor has subsequently to the date of the order obtained credit to the extent of 2*l.* or upwards without informing the creditor that he has an administration order; and it has been contended that under these provisions the rescission can only be ordered upon the application of one of the original creditors. In my opinion that is not a reasonable construction of the rule. It is difficult to understand what the framers of the rule could have meant, if the creditor could at once use the ordinary machinery for the enforcement of his rights. In my opinion, either an original or a subsequent creditor could apply under that rule to have the administration order rescinded in a case where the debtor is obtaining credit without disclosing to his new creditor the existence of the administration order. As to *Attensborough v. Henschel* (4), which is binding upon us, I cannot concur in the contention that under the power given by section 153 of the County Courts Act, 1888, the Court has no discretion to stay execution in a case where an external cause, such as an administration order under section 122 of the Bankruptcy Act, 1883, has come into existence to prevent the debtor from discharging his debts in the ordinary way; I cannot say that in such a case a County Court Judge would be unable to exercise a discretion as to staying execution. In my opinion that case does not show that such a case as the present might not come within the purview of that section. I

am of opinion that under the Bankruptcy Act, 1883, the County Court Judge has, in such a case as the present, power to stay the issue of execution by the subsequent creditor.

A. T. LAWRENCE, J.: I am of the same opinion. I think that the contention of counsel for the appellant that the right of a judgment creditor to issue execution against his debtor can only be taken away by express words was sound; but I think there are express words taking away the right in section 122, sub-section 5, of the Act of 1883. I think that the attempt to show that the word "creditor" in that sub-section must be read as "creditor existing at the date of the administration order" fails. The words are not in that sub-section, but it is sought to introduce them upon the construction of the various sub-sections, and I think the attempt fails. The words of sub-section 5 of section 122 are very plain, and I think that the words "no creditor" mean what they say—that is, "no creditor whether he be a creditor at the time of the order or become a creditor afterwards." That construction is necessary if the administration order is to have its full scope and effect. If every subsequent creditor could, of right, levy execution and sell the debtor's goods, the administration order would come to an untimely end at once. I think the true object of an administration order is, as far as possible, to enable the debtor to go on earning money and paying his debts, and for this purpose to protect him against his creditors, and in an indirect manner against himself. The effect of an administration order, with its schedule of creditors, which is placed at the Registrar's office in the County Court, is, or ought to be, to induce tradesmen not to give unlimited credit to the person against whom such an order has been made; and when the County Court Judge is asked to interfere under section 122, sub-section 5, he ought to exercise his discretion in the matter and consider whether or not the debtor has behaved in such a way as to be entitled to protection, and whether that protection is necessary in order to the carrying out of the administration order. All these matters are for his consideration, and in some cases, no doubt, he would in his discretion grant a stay of execution, and in other cases refuse it. If the stay is granted the creditor still has the right under sub-section 12 to be added to the schedule of creditors by the

Court. It is quite true that it is not a very advantageous remedy, but it is the best he can obtain under the circumstances, unless, indeed, he is in a position to come in under rule 15, sub-rule 8, of the Bankruptcy (Administration Order) Rules, 1902, and say that he was induced to give credit to the debtor in consequence of the non-disclosure to him of the administration order, and that therefore the whole administration order ought to be set aside. In that case the debtor will lose the great advantage given to him by section 122 of the Act of 1883.

That seems to me to be the scheme of the Act and the Rules, and, in my opinion, the County Court Judge gave the true meaning to them.

Appeal dismissed.

The plaintiff appealed.

Competon, for the appellant:

The question is whether the provisions of section 122 in Part VII. of the Bankruptcy Act, 1883, dealing with small bankruptcies, apply to a person who has become a creditor of the debtor at a date subsequent to the making of an administration order. A creditor who has obtained judgment has an inalienable right to enforce the judgment, unless such right has been taken away by express enactment. It has been held in *Attenborough v. Henschel* (4) that the words "sufficient cause" in section 153 of the County Courts Act, 1888, which empowers a County Court Judge to suspend execution in certain cases, mean some physical act or acts preventing a person from paying his debts and not mere inability to pay owing to want of means. That section was not relied upon by the County Court Judge, but is referred to as being one upon which it might be contended that he was entitled to rely. A person who has become a creditor of the debtor subsequent to the making of the administration order is not affected by the provisions of that section at all. He cannot be restrained from levying execution on a judgment in respect of a new debt, and it would be an anomaly if a new creditor could be held to be bound by proceedings to which he was not a party, and of which, as in the present case, he had not even had notice until he had obtained judgment. The form of administration order (see Administration Orders, 1902, Form 5) shows that it

does not apply to subsequent creditors, because the debtor is only ordered to pay the several debts in the schedule to the order. The property of the debtor is never changed except so far as execution may be levied under section 122, sub-section 4. This group of sections deals only with future earnings, and provision is made by rule 18 of the Bankruptcy (Administration Order) Rules, 1902, for the appointment by the Court of a person who is to have the conduct of the order. The County Court Judge relied on sub-section 5 of section 122 of the Act of 1883, but the Legislature never could have intended that a subsequent creditor who was no party to the administration order should be bound by it, and the words "no creditor" cannot mean a subsequent creditor, but only a creditor at the time of the making of the order. Sub-section 12 of section 122 allows a subsequent creditor to come in under the order on proof of his debt, but payment is postponed until the other creditors whose debts have been scheduled have been paid to the extent provided by the order. That provision entitles a creditor to come in and prove if he chooses to do so, and if he does so prove, then payment of his debt is postponed in the manner provided in the sub-section. Under Order 25, rule 42, of the County Court Rules, 1903, the power of a County Court Judge to commit a debtor in respect of a debt incurred before the date of the administration order is limited, but there is no such provision with regard to a debt incurred subsequently. The effect of that is to cut down the provisions of sub-section 5 of section 122. In *In re Frank* [1898] (1), it was held that a County Court Judge has no power under sub-section 5 to give a creditor bound by the order leave to levy execution as long as the administration order is in existence, and the effect of that decision is to prevent any one creditor getting an advantage over the other creditors without having the administration order set aside. If the construction which has been put upon sub-section 5 by the Divisional Court is right, then the appellant is in a worse position than he would be if he came in under sub-section 12. Under rule 7 of the Rules of 1903 no administration order is to be made under which the payment of instalments would, without default, extend over more than six years, but the effect of the order now appealed from is to extend the administration order beyond the period mentioned in that rule. The County

Court Judge here treated the appellant's only remedy as being that provided by sub-section 12 of section 122, but that is not a correct view of the appellant's rights.

No counsel appeared for the respondent.

Cur. adv. rult.

22 June.

COZENS-HARDY, J., read the following judgment: In order to appreciate the points raised in this appeal, it is necessary to consider in what respects an administration order under section 122 of the Bankruptcy Act, 1883, differs from an adjudication in bankruptcy under the general provisions of the Act. In the first place, an administration order does not divest the property of the debtor. It leaves him master of his small property, both present and future. But this is subject to the provision in section 122, sub-section 4, enabling, not any individual creditor, but the Registrar of the County Court, on behalf of all the creditors, to issue execution against the debtor's goods whenever they exceed 10*l.* in value (see Form 7 in the Appendix to the Bankruptcy (Administration Order) Rules, 1902). This is a power which can be exercised at any time during the continuance of the order. It in effect makes all future property of the debtor during the continuance of the order subject to the control of the Court, and perhaps explains the use of the phrase in section 122, sub-section 1, "an order providing for the administration of his estate." In the second place, in an ordinary bankruptcy the only creditors are those who can claim in respect of debts at the date of the receiving order: section 87. No provision is made for proof by subsequent creditors. But subsequent creditors are contemplated as being within the scope of the administration order. Section 122, sub-section 12, expressly enacts that they may be scheduled as creditors, though they will not be entitled to any dividend until scheduled creditors at the date of the order have been paid to the extent provided by the order (see also rules 10, 11, and 12 of the Bankruptcy (Administration Order) Rules, 1902).

This being the general scheme of the Act under section 122, it remains to consider how sub-section 5 ought to be construed. It says that, during the continuance of the order, "no creditor shall

have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court except with the leave of that County Court, and on such terms as that Court may impose"; and the question for our decision is whether this applies to subsequent creditors or only to creditors before the date of the order. The County Court Judge and the Divisional Court have held that it applies to all creditors, and upon the whole I think this is the correct view. It is not unreasonable to hold that any creditor who can claim to come in under, and to get the benefit of, the administration order should not be allowed to assert rights which would seriously lessen the operation of the order, and take away property which, in a certain sense, is being administered by the Court. This is strictly on the lines of sections 9 and 10 of the Bankruptcy Act, 1888. And I am not pressed by the argument that subsequent creditors are in a worse position than original creditors. In ordinary bankruptcies there are preferential creditors, but all creditors, whether preferential or postponed, are bound to prove for their debts. The policy of this legislation was to discourage the giving of credit to these small debtors against whom an administration order has been made. And rule 15, sub-rule 1 (3), makes it a ground for setting aside or rescinding an order that the debtor has subsequently obtained credit to the extent of 2*l.* or upwards without informing the creditor of the existence of the order. In a case like the present the Court might, on the application of the plaintiff, rescind the order and thus leave him free to levy execution, or, without rescinding the order, might give leave, under section 122, sub-section 5, to proceed with the execution. I am conscious that this is not consistent with the view expressed by at least one of the Judges who decided *In re Frank* (1). But the words seem to me sufficient to confer the jurisdiction, although the jurisdiction would only be exercised under very exceptional circumstances.

Counsel for the plaintiff founded an argument upon Order 25, rule 42, of the County Court Rules, 1908, made under the County Courts Act, 1888, which limits the power of commitment of a debtor whose debt was incurred before the date of the administration order, but makes no corresponding provision where the debt was incurred subsequently. I do not think any great weight attaches to this argument. Rule 42 cannot fairly be regarded as

an interpretation of section 122, sub-section 5, or as cutting down its full effect.

For these reasons I think the appeal should be dismissed.

COLLINS, M.R. : I agree with the judgment which has been read by Lord Justice COZENS-HARDY.

GORELL BARNES, P., read the following judgment : This was an appeal by the plaintiff against the judgment of the Divisional Court dismissing an appeal from an order of the County Court Judge at Bradford made in the action on 24 October, 1905, ordering that execution under a judgment recovered by the plaintiff against the defendant should be stayed.

The plaintiff had recovered judgment against the defendant on 27 June, 1905, for 5*l.*, to be paid by instalments of 5*s.* per month. The judgment was in respect of groceries which had been supplied by the plaintiff to the defendant. One instalment was paid under the judgment, and execution for the balance, which was due on default, was issued on 12 October, 1905, and that execution was stayed by the learned County Court Judge under sub-section 5 of section 122 of the Bankruptcy Act, 1883. The ground upon which the stay was obtained by the defendant was that there had been an administration order under the said section for the administration of the defendant's estate some three years before. The debt in question was contracted since that order, and the defendant did not inform the plaintiff of the administration order prior to the issue of the execution. Under the administration order the defendant had to pay 4*s.* per month on the debts to which it applied, and had made a certain amount of the payments. The learned County Court Judge held that the plaintiff, by virtue of the provisions of sub-section 12 of the said section 122, was only entitled to be scheduled as a creditor of the debtor, and not entitled to any dividend until the creditors who had been scheduled as having been creditors before the date of the order had been paid to the extent provided by the order.

The point raised is of some importance with regard to small bankruptcies, a scheme for dealing with which is contained in the said section 122. That scheme differs from the general scheme

provided by the Bankruptcy Act, 1883, under which, on the making of a receiving order, the Official Receiver is constituted receiver of the property of the debtor; thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose: section 9; and the Court may at any time after presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor: section 10, sub-section 2; and an order of discharge shall release the bankrupt from all debts provable in the bankruptcy, with certain exceptions not material to consider: section 30; and all debts and liabilities (with certain exceptions not material to consider), present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in the bankruptcy: section 37; and the property of the bankrupt divisible among his creditors shall comprise, *inter alia*, all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before his discharge: section 44; and under section 54 upon a debtor being adjudged bankrupt his property vests in the Official Receiver until a trustee is appointed, and then in the trustee. The effect of this scheme, speaking in general terms, is that all the property which the bankrupt has, or will have, before his discharge is to be applied in liquidation of his debts and liabilities existing at the time of his bankruptcy.

Under section 122, dealing with small bankruptcies, the County Court may make an order providing for the administration of the debtor's estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the County Court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just: sub-section 1. The section contains no provisions for vesting the estate in a receiver or trustee or other

person, but leaves the debtor in possession of his estate, unless under sub-section 4 his goods, exceeding in value 10*l.* (with certain exceptions), are seized under an execution issued by the Registrar of the County Court at the request of a creditor. Sub-section 5 provides as follows: "When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court except with the leave of that County Court, and on such terms as that Court may impose; and any County Court or inferior Court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified."

The real question in the case depends upon whether that sub-section applies to cases of debt contracted subsequent to the administration order, or is confined to debts existing at the time of that order.

Under sub-section 7 the order is to be carried into effect in such manner as may be prescribed by general rules. General rules have been made, dated 10 July, 1902, under which a debtor who desires to obtain an administration order has to file with the Registrar of the Court a request and a statement setting out a list of his creditors and debts, and stating that he is not indebted to any other person. The request has to be accompanied by an affidavit deposing that, to the best of his knowledge, information, and belief, the whole of his creditors and the true amounts due to them are set out in the list. Notice has to be sent to the creditors mentioned in the list of the day and hour when the request will be heard, and the Rules contain provisions for objections to debts scheduled being made or to the composition or instalments offered, and for notice of the order having been made being sent to each creditor whose debt has been admitted or proved, and for objections being made within a limited time. Under sub-section 9 notice of the order has to be sent to the Registrar of County Courts Judgments, and posted in the office of the County Court of the district in which the debtor resides, and sent to every creditor notified by the debtor, or who has proved; and under sub-section 10 any creditor of the debtor, on proof of his debt before the Registrar, shall be entitled to be scheduled as a creditor

of the debtor for the amount of his proof; and then, by sub-section 12, it is provided that "any person who after the date of the order becomes a creditor of the debtor shall, on proof of his debt before the Registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order."

Under sub-rule 8 of rule 7 of the Rules no administration order shall be made under which the payment of instalments, if kept up without default, would extend over a period of more than six years from the date of the order. Rule 18 provides for some person to be appointed to have the conduct of the order, and defines his duties; and rule 15 provides for the rescission of the order by the Judge in five cases, one of which is where the debtor, subsequent to the date of the order, has obtained credit to the extent of £1. or upwards without informing the creditor that he has an administration order, and the administration order may be set aside or rescinded under this rule on the hearing of a judgment summons, or on the application of any person entitled to take proceedings under rule 18.

Sub-section 13 of section 122 of the Act provides that when the amount received under the order is sufficient to pay each creditor to the extent thereby provided, and the costs of the plaintiff and of the administration, the order shall be suspended, and the debtor shall be discharged from his debts to the scheduled creditors.

Now it is important to notice that under this scheme, although the order is for the administration of the estate, the debtor is left in possession thereof, but that sub-section 4 appears to give the Registrar of the County Court power at any time during the existence of the order at the request of any creditor to seize the debtor's goods as therein provided, and that although sub-section 5 provides that when the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court, except with the leave of that County Court and on such terms as that Court may impose, it does not, in terms, confine the restriction to debts notified in the list attached to the request for an order, and would

therefore appear to admit of notification of a debt being given afterwards, and sub-sections 9 and 10 cover the case of creditors whose debts have not been notified, but who have proved, and it would seem that if the debtor at any time showed that such creditors, during the existence of the order, tried to enforce their claims otherwise than under the order, he could notify the Court and bring the restriction into operation in respect of those debts, and so if the section deals with creditors becoming such after the date of the order it would seem that their debts could be notified if it became necessary to do so.

Although sub-section 5 *prima facie* deals with creditors at the date of the order, it does not say so in terms, and sub-section 12 shows that the scheme contemplates affecting debts to creditors becoming such after the date of the order. What, then, is the effect of that last-mentioned sub-section? It would be a useless and inoperative sub-section if, notwithstanding it, any creditor who became such after the date of the order could proceed against the debtor unaffected by the order, and seize any goods which had not been seized under sub-section 4. For, unless sub-section 12 compels such a creditor, when his debt is notified by the debtor, to come in under the order, he would not be in the least likely to do so. In order, therefore, to give due effect to sub-section 12, it seems necessary to read sub-section 5 as applying to any creditor, whether his debt was incurred before or after the order.

The County Court Judge and the Divisional Court thought that this construction should be adopted, because otherwise creditors subsequent to the order would be able to prevent the debtor from carrying out the provisions of the order. It was urged that, by this construction, the subsequent creditors would suffer hardship; but the Court, under sub-section 5, can allow their proceedings to continue, and would probably do so if the debtor were in a position to pay his new debts without interfering with his payments under the order. The case of *In re Frank* (1), which was cited on the question of leave to proceed, was a case in which apparently one of the creditors at the time of the order was endeavouring to get leave to proceed, although he might originally have objected to the order, and probably that led to the decision (see the judgment of Mr. Justice WRIGHT). Moreover, in my opinion, that case placed a

too limited restriction on the power of the Court to give a creditor leave to proceed.

It was also urged that the Judge cannot set aside the order under rule 15 except on the hearing of a judgment summons or on an application of the person entitled to take proceedings under rule 13, and that therefore a creditor in the position of the plaintiff could not apply to have the order set aside; but in my opinion the terms of the rule do not thus limit the powers of the Judge, who could, in my judgment, have set aside the order in this case on the application of the plaintiff, if he had thought fit.

In my opinion Order 25, rule 42, does not prevent the effect of the said section 122 being what I have above indicated.

The case is not free from doubt and difficulty, owing to the manner in which the said section is drawn; but on the whole I have come to the conclusion that the judgment appealed from is right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Fielder, Fielder & Jones*, agents for *Fox & Crabtree*, Bradford, for Appellant.

IN RE PILLING, EX PARTE SALAMAN.

1906, July 9. BIGHAM, J.

Bankruptcy—Application by Trustee for Directions—Compromise of Claims—Complicated Circumstances—Discretion of Court—Duty of Trustee to determine Matter—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, sub-s. 6; s. 89, sub-s. 3.

On an application to the Court by a trustee in bankruptcy, under subsection 3 of section 89 of the Bankruptcy Act, 1883, for directions in relation to a particular matter arising under the bankruptcy, there is no obligation on the Court to give directions.

Where the circumstances are complicated the trustee ought to deal with the matter himself, with the assistance of the committee of inspection, and ought not to apply to the Court to relieve him from the obligation of forming his own judgment in the matter placed upon him by the Bankruptcy Act.

A RECEIVING order was made against the debtor, John Robert Pilling, on 7 September, 1898. He had in 1890 obtained from the Turkish Government a concession, jointly with one Joseph Elias, to construct, administer, and work a railway in Syria; and had formed, or assisted in forming, a company known as the Syria

Ottoman Railway Co., and other companies the object of which was the financing of that company.

By an agreement of 7 June, 1894, the railway company agreed to pay the debtor 10,000*l.* in cash within three months, and 60,000*l.* in cash within six months, after the Turkish Government should have approved certain plans relating to the concession, the payments meanwhile to be a charge on the undertaking of the railway company. Another agreement was entered into on 31 August, 1898, by which the debtor agreed to accept 2,750 fully paid ordinary shares of the company in part satisfaction of the liability of 70,000*l.*, and of other claims of the debtor against the company.

The debtor was not adjudicated a bankrupt till 27 January, 1904. An action had meanwhile been commenced in the Chancery Division by parties claiming charges on the debtor's interest under the agreement of 7 June, 1894, to which the debtor and the railway company and various other parties were defendants, for the enforcing of the charges by foreclosure or sale. On 4 February, 1904, an order for the compulsory winding-up of the railway company was made. The Chancery action, to which the trustee in the bankruptcy had been added as a party, was still pending, and in view of its very complicated character suggestions for a compromise were made. Ultimately the liquidator of the railway company offered to pay the trustee 8,500*l.* in settlement of any interest which the debtor might have under the agreement of 7 June, 1894, and of his claims against certain other companies, and also to satisfy the persons claiming charges in the action, and to pay the trustee's costs of the action. The proposed compromise was approved by the committee of inspection.

The debtor contended that the agreement of 31 August, 1898, had never become operative, and that his signature to it had been cancelled, and that if his estate were prudently administered it would realise more than the total amount of his indebtedness. He insisted that his charge of 70,000*l.*, and other claims to a large amount which he contended that he had against various parties in connection with the railway concession, ought to be adjudicated upon; and he had informed the trustee that he should hold him personally responsible for any loss sustained by the estate in consequence of the trustee's proceedings.

This was an application to the Court by the trustee (who was a chartered accountant) under section 89, sub-section 3, of the Bankruptcy Act, 1883 (1), for an order that the trustee might be at liberty to compromise all claims against the liquidator of the railway company and other parties by accepting from the liquidator 8,500*l.* and his costs in the Chancery action.

E. Clayton, for the trustee:

The trustee comes to the Court asking for its sanction to the proposed compromise, in order to have the protection of that sanction against possible future actions by the bankrupt in respect of the compromise. The bankrupt may not be a *cestui que trust* of a possible surplus in such a way as to make the case precisely like the sanction by the Chancery Division of a compromise on an application to which the *cestui que trust* is a party; but the trustee is entitled at all events to ask the Court for such protection against possible claims by the bankrupt as will be afforded by an order that the trustee be at liberty to enter into the compromise.

[*BIGHAM, J.*: He is already at liberty to do so under the provisions of sub-section 6 of section 57 of the Act of 1883 (2).]

He has a right to ask for a declaration to that effect, or for an order sanctioning the compromise.

Montague Lush, K.C., and *A. H. Carrington*, for the debtor:

The claims which the debtor's estate may in certain events succeed in establishing are very large, and there may very well be a surplus on the estate if the claims are pressed. There are really no facts which justify the abandonment of such large claims as proposed by the trustee.

(1) Bankruptcy Act, 1883, s. 89, sub-s. 3: "The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy."

(2) Bankruptcy Act, 1883, s. 57: "The trustee may, with the permission of the committee of inspection, . . . (6) . . . compromise all debts,

claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms, as may be agreed on."

BIGHAM, J.: This matter comes before me on an application under sub-section 3 of section 89 of the Bankruptcy Act, 1888, which provides that the trustee may apply to the Court for directions in regard to any particular matter arising under the bankruptcy. There is, as I understand, no obligation on the Court to give directions, and in the present case I do not propose to give any. This is an application by the trustee for the sanction of the Court to his entering into a compromise of certain claims which he is supposed to have against a number of different corporations and persons. The circumstances which are put forward in support of the compromise are extremely complicated and difficult to understand. They are exactly the kind of considerations which in my opinion the trustee ought himself to deal with, with the assistance of the committee of inspection, and it is not right that he should apply to the Court to relieve him from the obligation which the Act of Parliament puts upon him. He is a man of business, and he must consider for himself whether the compromise is a reasonable one or not. The committee of inspection have a right to be consulted in the matter, and they must form their own opinion about it. As I have intimated already, I am not going to say a word either in favour of this compromise or against it, except this: that it is a matter entirely for the consideration of the trustee, and one upon which he must form his own judgment. I do not know whether that is saying anything in favour of it or not, but that is all that I propose to say about it. I do not express any opinion one way or the other, nor shall I give any direction.

Counsel for the trustee asked that the trustee might have his costs out of the estate, and counsel for the debtor submitted that the debtor also ought to have his costs.

BIGHAM, J., made an order that the trustee should have his costs out of the estate, but made no other order as to costs, intimating an opinion that the application to the Court was caused by the action of the debtor.

Solicitors: *A. J. Benjamin*, for Trustee.

W. S. Fiske, for Debtor.

IN RE CRIGGLESTONE COAL CO.

1906, May 15, 22. BUCKLEY, J.

May 31. C. A. COLLINS, M.R., ROMER AND COZENS-HARDY, L.JJ.

Company—Winding-up—Assets covered by Debentures—Unsecured Creditor—Possibility of Benefit—Right to Winding-up Order—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79.

An unpaid creditor of a company who shows the company to be insolvent is entitled *ex debito justitiae* to a winding-up order, subject to the right of the majority of creditors of the class to which he belongs to oppose the petition.

It is no defence to the petition on the part of the company that there are no assets to wind up; and if the order will be useful, though not necessarily fruitful, there is jurisdiction to make it.

Per COLLINS, M.R.: The onus of proving that in no possible case could the petitioner gain any benefit from a winding-up order is upon the company and the debenture-holders claiming through it.

APPEAL from a decision of BUCKLEY, J., on the petition of an unsecured creditor for a compulsory winding-up order.

The company was incorporated in January, 1895, with a capital of 100,000*l.* in 10,000 10*l.* shares. The amount of capital paid up or credited as paid up was 70,000*l.*, 8,000 preference and 4,000 ordinary shares having been issued. The object of the formation of the company was to acquire and work certain collieries known as the Crigglestone and Durkar Collieries, in Yorkshire, and to carry on the business previously carried on there. The collieries were held under leases empowering the lessors to re-enter on a winding-up. There were five directors. One, Mr. Scholefield, was a vendor to the company; and another, Mr. Brotherton, held 1,500 shares. The company issued first mortgage debentures in 1895 to the amount of 25,000*l.*, 1,000*l.* of which were held by Mr. Scholefield. It was for a time fairly prosperous, and continued to pay the dividends on its preference shares until 1903. Difficulties, however, arose through a fault in a coal seam and in connection with an inrush of water, though Mr. Deacon, a mining engineer, who inspected the collieries in 1904, reported in that year to the effect that if an expenditure of 30,000*l.* were incurred the gross profits of the collieries would be 25,000*l.* a year, and he valued the collieries at that date at 165,000*l.* Twenty thousand pounds was raised on second debentures in October, 1904, and in November, 1904, an

issue of 40,000*l.* third debentures was created. The three issues of debentures constituted a floating charge on all the property and assets of the company present and future; and the first debentures were secured by trust deed. Mr. Stewart, the chairman of the board of directors, held 3,000*l.* third debentures, and was a trustee of the trust deed securing the first debentures. Nineteen thousand pounds of the third debentures were held by Mr. Brotherton, and represented the security for advances made by him from time to time from 1904 till November, 1905, which in fact enabled the company to continue its business. Mr. Brotherton was also an unsecured creditor. At a board meeting held on 27 November, 1905, it was announced that Mr. Brotherton was unable to provide further sums, though he in fact did advance a further sum of 1,500*l.* in December, 1905. Mr. Deacon also advanced 1,000*l.*, receiving third debentures for 2,000*l.* Meanwhile, at a board meeting held on 20 November, 1905, it had been resolved to order certain electrical cables for use in the collieries, and the order was at first given to a firm of Hirst & Son, to whom, at the end of December, 1905, a payment of 200*l.* was made. The order to them was, however, cancelled by arrangement, and on 5 December, 1905, it was given instead to a company named the British Insulated and Helsby Cables Co. The cables were delivered by them on 20 December, 1905. Mr. Brotherton's advance of 1,500*l.* was not used to pay the debt, 716*l. 1s. 4d.*, incurred in respect of them, and it had in fact never been paid. The interest on the first debentures was paid in December, 1905, but on 8 January, 1906, the board of directors resolved that the company should cease to carry on business. On the following day the trustees for the first debenture-holders commenced a debenture-holders' action against the company, and a receiver and manager had been appointed in the action.

In April, 1906, the British Insulated and Helsby Cables Co. presented this petition, alleging that the company was insolvent and unable to pay its debts, that it was possessed of assets of considerable value, and that if the business were carried on and sold with a due regard to the interests of the ordinary creditors there would probably be sufficient to pay a part of the ordinary debts. It alleged, also, that it was desirable that an inquiry should be held as to the failure of the company and as to the conduct of its business.

The debt was not disputed, and it was admitted that the company was insolvent.

After the presentation of the petition the collieries were put up for sale by auction under an order made in the debenture-holders' action, but were not sold.

It appeared that the lessors were not unwilling to assist in selling the property.

H. E. Gardner, for the petitioners :

The position if the company is allowed to continue will be that which was animadverted on in *In re London Pressed Hinge Co., Campbell v. Company* [1905] (1); and, in order to prevent the debenture-holders carrying on the business in the company's name and incurring debts which the unsecured creditors will be unable to recover, the company ought to be wound up, as in *In re Chic, Limited* [1905] (2) and *In re Alfred Nelson & Co.* [1906] (3).

Buckmaster, K.C., and *H. M. Humphry*, for first debenture-holders :

In the present case the misfortunes of the company were due entirely to a geological accident which could not have been foreseen by any one. No improper conduct of any kind can be imputed to the debenture-holders or to the company. The company in the present case will not continue trading; the business will not be carried on for the benefit of the debenture-holders: it will simply be carried on by the receiver appointed by the Court in the debenture-holders' action. All that the debenture-holders contend is that a winding-up order ought not to be made in circumstances such that it will injure them by occasioning a forfeiture of the leases of the mines, while the unsecured creditors will obtain absolutely nothing from it. The case is governed by the judgments of the Court of Appeal (see especially those of COTTON, L.J., and

(1) 12 Manson, 219; [1905] 1 Ch. 576; 74 L. J. Ch. 321; 92 L. T. 409; 53 W. R. 407; 21 T. L. R. 322.

(2) 12 Manson, 342; [1905] 2 Ch. 345; 74 L. J. Ch. 597; 93 L. T. 301; 53 W. R. 659.

(3) *Ante*, p. 190; [1906] 1 Ch. 841; 75 L. J. Ch. 509; 94 L. T. 641; 54 W. R. 468.

BOWEN, L.J., in *In re Chapel House Colliery Co.* [1883] (4), where, as here, the company was a colliery company, and the mine was leasehold and liable to forfeiture on a winding-up) and by the decision of Sir G. JESSEL, M.R., in *In re St. Thomas Dock Co.* [1876] (5). There the dock was practically the only asset of the company, as the colliery is here. Where the assets of a company are not sufficient to pay the debenture-holders a debenture-holders' action is the only liquidation: *In re Edgbaston Brewery Co.* [1893] (6). In that case a winding-up order was refused on the petition of an outside creditor, though the case was far stronger than the present one.

Baden Fuller, for Mr. Moulton, a second debenture-holder, and Mr. Brotherton, as a holder of third debentures:

If a winding-up order is made the second and third debenture-holders will be in a position still worse than that of the first debenture-holders. Under section 91 of the Companies Act, 1862, the Court may regard the wishes of the creditors, having regard to the value of their debts; and the debenture-holders have as much right to have their wishes consulted as have the unsecured creditors.

E. W. Manson, for the company.

Gardner, in reply:

In *In re St. Thomas Dock Co.* (5), and *In re Chapel House Colliery Co.* (4), the petitions were presented by debenture-holders and opposed by a large number of other debenture-holders; and there was a prospect that if the company were allowed to go on the debts would be paid and a fair business be left for the company.

Cur. adv. vult.

May 22.

BUCKLEY, J.: This is a colliery company. The petitioners are creditors in respect of a debt of 716*l.* for electrical cables supplied on 20 December, 1905, under an order given on 5 December, 1905. They are unpaid, and ask for a winding-up order. The debt and

(4) 24 Ch. D. 259; 52 L. J. Ch. 934; 49 L. T. 575; 31 W. R. 933.

(5) 2 Ch. D. 116; 45 L. J. Ch. 304; 34 L. T. 228; 24 W. R. 544.

(6) 68 L. T. 341; 3 Rep. 328.

the insolvency are both admitted. They are opposed by debenture-holders on the sole ground that there are no assets for unsecured creditors, and that the debenture-holders' security may be affected by a winding-up order, inasmuch as the company's lessors will in that case have power to re-enter. The company appear by counsel, but have taken no substantial part in the argument, having, indeed, no interest in the matter. On 8 January, 1906, the directors passed a resolution that the company should forthwith cease to carry on business. They have done so, and under a writ issued on 9 January in a debenture-holders' action, in which Stewart, the chairman of the company, and two others, as trustees for the first debenture-holders, are plaintiffs, a receiver and manager has been appointed. The debenture-holders say (and that, I regret to say, is the law) that they, as the owners of a floating charge upon all the present and future property of the company, are entitled to the goods which the petitioners supplied, and are not (as again is the law) liable to pay for them. They say that the company's leases contain powers in the lessors to re-enter if a winding-up order is made; that a winding-up order, therefore, might injure the debenture-holders; and that the unsecured creditors ought, therefore, not to have such an order.

The short history of the company is as follows: It was incorporated in 1895, and has a paid-up capital of 70,000*l.* A Mr. Brotherton, who is one of the directors, is a large shareholder. It has issued debentures as follows: first mortgage debentures, created on 1 July, 1895, 25,000*l.*; second mortgage debentures, created on 21 October, 1904, 20,000*l.*; third mortgage debentures, created on 4 November, 1904, 40,000*l.* These debentures constitute a floating charge on all present and future property of the company. The company is governed by a board of five directors, of whom three are debenture-holders — namely, Stewart, the chairman, holding 3,000*l.* third debentures; Brotherton (whom I have mentioned), holding 19,000*l.* third debentures; and Scholefield, who was a vendor, holding 1,000*l.* first debentures. A majority of the board, therefore, had, as debenture-holders, an interest in keeping the undertaking of which they are mortgagees supplied with plant, &c., whether the company was in a position to pay for it or not. Down to 1903 the company paid its preference dividend.

Of late it has not been so fortunate. There is a fault in the coal seams, and that fault and difficulties with water have for the last few years rendered the conduct of the company's business very difficult. Mr. Brotherton and some others who were already largely involved in the undertaking have from time to time found further money. The third mortgage debentures, amounting to 40,000*l.*, have been issued at various dates from 4 November, 1904, to 18 December, 1905. The security given for advances made to the company was such that Brotherton, or other the person making the advance, became, by virtue of his debentures, immediately mortgagee of his own advances and of their investment. Moreover, to the extent to which goods were ordered and not paid for, Brotherton and other debenture-holders became mortgagees of the goods and not liable to make payment for them. The order which gave rise to the petitioners' debt was approved by the board on 20 November, 1905, Brotherton being in the chair. The order had been given to a firm of A. Hirst & Son, but Maddison, the managing director, cancelled the order to Hirsts by arrangement with them, and on 5 December gave the order to the petitioners. I find that on 28 December a payment was made to Hirsts of a sum of 200*l.* From this I infer that they were already creditors of the company, and it may be, although at present I have no means of knowing whether it is the fact, that the order went to the petitioners and not to Hirsts, because Hirsts were not willing to give future credit. This may be a matter for investigation. Down to November, 1905, the company had been struggling on with money found by Brotherton from time to time, for which he got third debentures. At a board meeting of 27 November it was reported that Brotherton was unable to provide any further money. A Mr. Deacon agreed to find 1,000*l.*, and on 18 December he received for that advance third debentures for 2,000*l.* It was in this state of facts that the order passed by the board on 20 November was on 5 December given to the petitioners, and delivery of the goods accepted on 20 December. Brotherton relented to a certain extent, and on 15 December advanced a further sum of 1,500*l.* This is found recorded in a minute of 18 December. The money was not used to pay for the electric cables. On 28 December the first mortgage debenture interest was paid. The petitioners' debt was left unpaid. On

8 January there followed the resolution of the board to cease to carry on business.

Upon this state of facts I have to consider whether the petitioners are entitled to an order. I will state shortly what I take to be the law. First, as between the creditor and the company, who are his debtors, the unpaid creditor who shows insolvency is entitled *ex debito justitiae* (as it is generally termed) to a winding-up order—that is to say, to an order by virtue of which the creditor, by the hands of a liquidator, is entitled to seize the assets of his debtor and administer them for the payment of himself and other creditors. In *Bowes v. Hope Mutual Life and Assurance Honesty Guarantee Society* [1865] (7) are to be found the oft-quoted words of Lord CRANWORTH upon the subject, where he qualifies this right only by the words "One does not like to say positively that no case could occur in which it would be right to refuse it." The words of Lord CRANWORTH are supported by the very high authority of Lord SELBORNE in *In re Western of Canada Oil, Lands, and Works Co.* [1873] (8), and repeated by Sir GEORGE JESSEL in the same case. This right of the unpaid creditor may be called, as Lord BOWEN called it in *In re Chapel House Colliery Co.* (4), a right to equitable execution. A creditor who obtains judgment, and issues execution at law, has a legal right to that means of satisfying his judgment. Subject to qualifications, one of which rests in the fact that the language of the Act is "may" and not "shall," and to the reservation which Lord CRANWORTH made, and subject to what I shall presently say as to the representative position of the petitioner, it seems to me that the petitioning creditor has, as between himself and his debtor, a similar right *ex debito justitiae* to seize his debtor's assets by the hand of a liquidator and administer them for the benefit of his class. There are cases in which such an order has been refused on the ground that there were no assets to seize. In my judgment this is no exception to or qualification of the right. It is only affirming that if there are no assets the rule does not apply. If the right is to seize the debtor's assets by the hand of a liquidator, it is no exception to say that there is no

(7) 11 H. L. C. 389; 35 L. J. Ch. 574; 11 Jur. (N.S.) 402; 14 L. T. 316; 14 W. R. 506.

(8) L. R. 17 Eq. 1; 43 L. J. Ch. 184.

such right when there are no assets. There cannot be a right to seize nothing. This so-called exception, therefore, is not an exception to the rule, but a statement that under these circumstances there is nothing upon which the rule can operate. Subject to the foregoing, I think that, as between the creditor and the company as his debtor, the creditor who proves insolvency is, without exception, entitled *ex debito justitiae* to a winding-up order.

But there comes another consideration—namely, that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right *ex debito justitiae* is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon section 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority are entitled to prevail, but on which the debtor has no voice. The views as to the rights of the petitioning creditor which I have thus endeavoured to express are, I believe, consistent with all the authorities. The company will often put forward, as if it were matter of defence, that there are no assets to wind up. It is not matter of defence at all. The Court has often refused an order upon that ground, but not because it lies in the debtor's mouth to say that he is not amenable to the jurisdiction because he has no property, but because the Court does not make an order when no benefit can result. If the order will be useful (not necessarily fruitful) there is jurisdiction to make it. This view is illustrated by the fact that in many cases, and particularly since the Act of 1890, the Court will make an order, not because there are assets, but in order to provide the machinery for ascertaining whether there cannot be shown to be assets. *In re Krasnapsky Restaurant and Winter Garden Co.* [1892] (9) is an illustration of this.

The tendency of the Court to refuse an order on the ground

9) [1892] 3 Ch. 174; 61 L. J. Ch. 593; 67 L. T. 51; 40 W. R. 639.

that there are no assets has been largely modified by the fact, which I learned upon inquiry at the Companies Winding-up Office soon after I had to take part in the conduct of this business, that a winding-up order under those circumstances does not do material harm. Under rule 186 of the Companies Winding-up Rules, 1908, the Official Receiver is not to proceed actively in the winding-up if there are not assets. The only real danger is lest petitions should be presented simply for the purpose of making costs where there is really nothing to wind up—a danger against which the Court is strong enough to defend itself. An order when there is nothing at all to wind up may at times be justified as the means of bringing to an end a vicious career.

I do not regard any of the cases which have been referred to as inconsistent with that which I have laid down. In *In re St. Thomas Dock Co.* (5), and in *In re Chapel House Colliery Co.* (4), the contest lay not between the unsecured creditor and the debtor, nor between the unsecured creditor and the secured creditors, but between one secured creditor and others of the like class. A mortgagee is, of course, entitled to pursue all his remedies at once, and in *In re St. Thomas Dock Co.* (5) the debenture-holder had served the statutory notice for his unpaid debenture interest, and was no doubt pursuing his remedy as a general creditor, although he also held security. But the ground of the decision was that the company had a going business, and that a large majority of the class of which he was a member thought they had a better chance of obtaining payment if an order were not made. The same was the position in *In re Chapel House Colliery Co.* (4), with the addition that in that case not the secured creditors only, but the unsecured also, opposed. There are in the judgments in that case of Lord Justice COTTON and Lord Justice BOWEN expressions which, read apart from their context, and in forgetfulness of the facts of the case, may seem to mean that an order ought to be refused unless the petitioner shows that money will result to him from the making of it. But that is not, in my judgment, their real meaning, and subsequent authorities have not treated that as being their meaning. The Court of Appeal was dealing with a petitioner who was met with such an opposition as I have described, and the Lords Justices were addressing themselves to the question of the remedy

to which, under those circumstances, he was entitled. Mr. Justice VAUGHAN WILLIAMS, I think, certainly so understood it. If not, he could not have decided *In re Krasnapolsky Restaurant and Winter Garden Co.* (9) as he did ; and in *In re Edgbaston Brewery Co.* (6) he would have had a much shorter answer to the petition than that which he gave. He there points to the consideration that if an order is refused friends of the company might come forward, or a reconstruction scheme might be started which would give the creditors a chance of getting something, and that the wishes of the majority ought to be regarded, arguments to which there would have been no occasion to resort if the short answer were that there were no assets, and there could therefore be no order.

The outcome of it, therefore, in my opinion, is that it is no answer, as between the petitioner and the company, that the debenture-holders will or may sweep away all the assets. As between the creditors and the company, the former are entitled to seize and administer so as, if possible, to escape that result. Is it, then, an answer as between the petitioner and those who appear to oppose this petition ? The parties who have given notice to appear, and who do appear before me to oppose this petition, are the following : Mr. Stewart, the chairman of the company, holding 3,000*l.* third debentures ; Mr. Brotherton, a large shareholder and a director, holding 19,000*l.* third debentures ; Mr. Moulton, holding 20,000*l.* second debentures ; and Mr. Chalker, a solicitor and the partner of Mr. Stewart, holding 600*l.* first debentures. Mr. Brotherton is also an unsecured creditor ; but he has not given notice to attend, and is not appearing, in that character. He opposes in the character of a debenture-holder. His case is that as an unsecured creditor he has no interest. As between the petitioners and the debenture-holders who thus appear to oppose, the matter seems to me to stand in this position. The debenture-holders are not members of the class on whose behalf the petitioners apply to the Court. They are persons who claim to stand as mortgagees outside of and before the petitioners' class, and who say that the petitioners are without a remedy because they (the debenture-holders), rank before them. They are, for all purposes, the petitioners' opponents, and not members of the class that they represent. In determining what the petitioners' rights

are, the Court ought, I think, to disregard the fact that a different course may be more advantageous for the mortgagees. There is a debenture-holders' action. In that action the defendants, the company, are in no way interested. The unsecured creditors are, or may be. They are interested in the accounts to be taken of what is due upon the debentures, and in the question, if there be a question, whether the debentures were *bona fide* issued for value and in a course of honest trading, looking at the circumstances of the company, and its current liabilities at the time. They are interested in the terms upon which, and the circumstances under which, the property shall be realised. If I make a winding-up order the unsecured creditors, by the Official Receiver, will in fact control the defence in that action. This is a real advantage, to which they are, I think, entitled. Beyond this, I think that the unsecured creditors are entitled to investigate the circumstances under which the company, between November, 1904, and December, 1905, obtained further moneys and issued further debentures to the extent of 40,000*l.*, depending for its daily existence upon the willingness of Brotherton and others to find further money.

It is, no doubt, an important circumstance to be borne in mind that the leases contain powers of re-entry in case an order is made. There is, however, no evidence that the lessors will avail themselves of those powers. On the contrary, such evidence as exists is to the effect that the lessors are willing to give assistance in selling the property. If the debenture-holders were really pressed with anticipations of danger from a winding-up order they would, I think, show greater disposition than they do to meet what is the certainly not unreasonable desire of the petitioners to be paid; and if, contrary to my opinion upon the evidence, there is danger to the debenture-holders' security if an order is made, it is a fair answer to them that they elected to accept a security upon the property of a company which had by contract given to its lessors a right of re-entry in that event, and that it does not lie in their mouth to say that their debtor must therefore, for their benefit, be relieved from the legal consequences which result in favour of its creditors from incurring debts and not paying them. I may add that this is *à fortiori* true when in substance, though not in form, it

was the debenture-holders who, for their own purposes, although in the name of the company, incurred the petitioners' debt.

The result is that, in my judgment, neither the company, who are the debtors, nor the debenture-holders, who are their incumbrancers and the persons by and for whom this business has for some time past been carried on, are entitled to stay the hand of the Court in giving to the company's unpaid creditor his statutory remedy—the right to seize and administer by the hand of a liquidator, for the benefit of himself and others of his class, such assets as he can reach by the operation of a winding-up order, and the consequential rights which will flow from it under the Act of 1890. I therefore make a compulsory order.

The debenture-holders and the company appealed.

Buckmaster, K.C., and H. M. Humphry, for the appellants:

The real appellants here are the debenture-holders, and the company are only associated with them for the purposes of the appeal. The petition was opposed because the assets were not sufficient to pay the first debenture-holders, and further because the pendency of the petition affected prejudicially the realisation of the debenture-holders' security. BUCKLEY, J., made the winding-up order because he considered that, as there was no real defendant in the debenture-holders' action, the presence of the liquidator at the winding-up proceedings might be an advantage. He was also shocked at the results which followed from the exercise by the debenture-holders in this case of their indisputable legal rights under their debentures. It is, however, no part of the business of the Court to consider the hardship arising from the exercise of the rights given by the floating securities, for the Court has no power to stop the exercise of such rights. If those rights are to be altered it must be by the Legislature, and not by the Court. The judgment of the learned Judge that under the circumstances the unsecured creditor was entitled as a matter of right to a winding-up order is not in accordance with the authorities. The *dictum* of Lord CRANWORTH to that effect in *Bowes v. Hope Mutual Life Assurance and Honesty Guarantee Society* (7) has been modified by the subsequent cases which show that the Court will not exercise its

winding-up jurisdiction where no good will result to the unsecured creditor from any such exercise: *In re St. Thomas Dock Co.* (5), *In re Chapel House Colliery Co.* (4), and *In re Edgbaston Brewery Co.* (6). No doubt, if a case were made out for investigation either by reason of misfeasance or fraudulent disposition of the property of the company, a winding-up order might be made. In the present case there is no suggestion that the circumstances under which the debentures were issued require investigation. On no hypothesis can the winding-up order result in any benefit to the unsecured creditors, and it ought not consequently to be made. *In re Krasnapolsky Restaurant and Winter Garden Co.* (9) is not inconsistent with the earlier decisions, for in that case the Court came to the conclusion that, as a matter of fact, it had not been made out that there were no available assets. The circumstances under which this company has recently been carried on were so serious that SWINFEN EADY, J., made an order for the sale of the property without waiting to ascertain who the debenture-holders were: *In re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.* [1906] (10).

Younger, K.C., and H. E. Gardner, for the petitioners, the respondents:

The decision of BUCKLEY, J., was not only well warranted by the authorities, but was justified by the facts. When the debt on which the petition was founded was incurred, the directors knew that the company was insolvent. It is for the company and the debenture-holders claiming through them to establish affirmatively that under no circumstances can the unsecured creditors receive anything in the winding-up, and they have failed to do so.

[They were stopped.]

COLLINS, M.R.: This case appears to me to depend on the truth of the appellants' assertion that in no possible case could the petitioners gain any benefit from the winding-up order. Is there any possibility of the creditors reaping any fruits out of it? It seems to me that the onus is clearly upon the debenture-holders to negative that possibility. They are met, to start with, by the

(10) *Ante*, p. 181; [1906] 1 Ch. 523; 75 L. J. Ch. 307; 94 L. T. 471; 54 W. R. 298.

proposition, affirmed by the House of Lords, that *prima facie* the right of a creditor who cannot obtain payment of his debt to obtain a winding-up order is *ex debito justitiae*. Certain exceptions have been engrafted upon that right; but, as was pointed out by Mr. Justice BUCKLEY, they are of a very special character, and are not really exceptions, but depend upon this consideration: that the Court will not give the creditor the right to seize the company's assets by the hand of the liquidator where there are no assets to seize. If there is a reasonable probability, or even a reasonable possibility—I think it may be put as high as that—that the unsecured creditors will derive any advantage from a winding-up, the order ought to be made so that they may be heard in the debenture-holders' action, and not have the proceedings left in the hands of other persons who are antagonistic to their interests. In my opinion the judgment of Mr. Justice BUCKLEY is perfectly right, and this appeal fails.

ROMER, L.J.: I am of the same opinion. If it was proved that no possible benefit could accrue to the unsecured creditors, I should agree with the appellants that a winding-up order ought not to be made, especially as the winding-up order might possibly give the landlords of the colliery rights which might be used prejudicially to the appellants' interest; but it is for those who oppose the petition to satisfy the Court that no possible good could accrue to the petitioners from a winding-up order. Mr. Justice BUCKLEY came to the conclusion that some good might result; and on looking into the evidence I am not satisfied that, if some one is appointed to represent the unsecured creditors and look after their interests, there might not eventually be some surplus coming to the unsecured creditors. As Mr. Justice BUCKLEY pointed out, they are interested in the accounts to be taken of what is due on the debentures. They are interested in seeing whether any of the debentures may be attacked, although I do not suggest that any case has been made out for attacking them. But I rely particularly on the passage in Mr. Justice BUCKLEY's judgment where he speaks of the interest of the unsecured creditors in a debenture-holders' action. He says: "They are interested in the terms upon which, and the circumstances under which, the property shall be realised. If I make a

winding-up order the unsecured creditors, by the Official Receiver, will in fact control the defence in that action"—that is, the debenture-holders' action. "This is a real advantage, to which they are, I think, entitled." As matters stand, for the reasons I have pointed out, I think it may well be that if this company is wound up, and the unsecured creditors are represented by the Official Receiver in the debenture-holders' action, some good may result to the petitioners. I cannot say it is hopeless. I therefore think that this appeal fails.

COZENS-HARDY, L.J.: I am of the same opinion. I think that the Court ought not to be astute in endeavouring to support the contention that there is no possibility of any surplus being got for the unsecured creditors. I say this partly for the credit of the directors, whose honesty I assume. In December last they acted on the belief that this was a company which had a future before it. They had themselves put in the evidence the reports of a skilled expert who said that if 30,000*l.* was spent upon the property it would produce a profit of 25,000*l.* a year, and who valued the property at 165,000*l.* The directors themselves put forward these reports. They do not venture to say that the reports are inaccurate. They acted on the footing that they were true so late as December last, and for their credit I think it scarcely lies in their mouths to say that no winding-up order ought to be made because there can be no assets for the unsecured creditors.

Speaking for myself, I attach great importance to a winding-up order in the case of a company which has issued debentures in the way this company has done. Anything more unsatisfactory than leaving the affairs of the company in the hands of the debenture-holders alone I cannot imagine.

Appeal dismissed.

Solicitors: *Gribble, Oddie, Sinclair & Johnson*, agents for *Stewart & Chalker*, Wakefield, for Appellants.

Rawle, Johnstone & Co., agents for *Hill, Dickinson & Co.*, Liverpool, for Respondents.

RUBEN AND ANOTHER v. GREAT FINGALL
CONSOLIDATED, LIMITED (1).

1906, June 14, 15, 18; July 19. H. L.

Company—Share Certificate—Forgery by Secretary—Warranty of Title—Estoppe.

A company is not liable in damages for loss sustained by the purchaser for value of a certificate on which the names of the directors, whose signature under the articles of association is necessary to the validity of the certificate, have been forged by the secretary. The fact that the certificate is in proper form and delivered by the secretary in the ordinary course of his duty does not operate in such a case as a warranty or representation of genuineness or estop the company from denying the validity of the certificate.

Decision of the Court of Appeal (2) affirmed.

Shaw v. Port Philip Gold Mining Co. (3) doubted.

APPEAL from a judgment of the Court of Appeal (COLLINS, M.R., STIRLING, L.J., and MATHEW, L.J.), reversing the decision of KENNEDY, J., in an action in which the appellants were plaintiffs and the respondents defendants. The question was whether the respondent company was liable to the appellants for the loss occasioned to them by the fraud and forgery of its secretary.

The facts are stated by the LORD CHANCELLOR in his judgment.

Isaacs, K.C., and Danckwerts, K.C. (J. D. Crawford with them), for the appellants:

Rowe, as the secretary of the company, was the person authorised to deliver share certificates. The certificate was in the form prescribed by the articles of association, purporting to bear the signatures of two directors, and actually countersigned by the secretary. The appellants innocently and in ignorance accepted the certificate as a valid document of title. In these circumstances the respondents are estopped from denying the representation made by their authorised agent. The case is on all-fours with *Shaw v. Port Philip Gold Mining Co.* [1884] (3), where the Court held that the company had warranted the genuineness of the certificate.

(1) Coram, The Lord Chancellor (Lord Loreburn), Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Lord Atkinson.

(2) 11 Manson, 363; [1904] 2 K. B. 712; 73 L. J. K. B. 872; 91 L. T. 619; 53 W. R. 100; 20 T. L. R. 720.

(3) 13 Q. B. D. 103; 53 L. J. Q. B. 369; 50 L. T. 685; 32 W. R. 771.

That case was cited without disapproval in *Balkis Consolidated Co. v. Tomkinson* [1893] (4), where also the company was held to be estopped. *In re Bahia and San Francisco Railway* [1868] (5) was a similar case of estoppel, and was approved in this House in *Balkis Consolidated Co. v. Tomkinson* (4). The present appeal is an illustration of the general doctrine expressed by WILLES, J., in *Barwick v. English Joint Stock Bank* [1867] (6), which has always been quoted with approval—the doctrine, namely, of the master's responsibility for the wrongs done by a servant or agent for the master's benefit. Fraud is expressly stated to be no exception to the principle. The words "for his master's benefit" import no more than that the wrongful act was done in the ordinary course of duty. Thus in *Dyer v. Munday* [1895] (7) the master was held liable for an assault committed by the servant; and in *Hambro v. Burnand* [1904] (8) principals were bound by conduct of their agent which was in his own interest but adverse to theirs.

[Lord DAVEY referred to *Limpus v. General Omnibus Co.* [1862] (9).]

That case is distinguishable, because the wrongful act was not done in the course of duty, but in contravention of explicit orders. *Barwick v. English Joint Stock Bank* (6) was approved in *Mackay v. Commercial Bank of New Brunswick* [1874] (10), and in *Houldsworth v. City of Glasgow Bank* [1880] (11).

The authority most adverse to the appellants is *British Mutual Banking Co. v. Charnwood Forest Railway* [1887] (12), but there

(4) [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 42 W. R. 204; 1 Rep. 178.

(5) L. R. 3 Q. B. 584; 9 B. & S. 344; 37 L. J. Q. B. 176; 18 L. T. 487; 16 W. R. 862.

(6) L. R. 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

(7) [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276; 14 Rep. 306.

(8) [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251; 20 T. L. R. 398.

(9) 1 H. & C. 526; 32 L. J. Ex. 34; 9 Jur. (N.S.) 333; 7 L. T. 641; 11 W. R. 149.

(10) L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 22 W. R. 473.

(11) 5 App. Cas. 317; 42 L. T. 194; 28 W. R. 677.

(12) 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.

the act of the agent complained of was *ultra vires* of the principal, not, therefore, done in the course of the agent's employment. It was also done for the agent's private ends. But that case is of doubtful authority, and inconsistent with the others already cited. The language used would imperil any dealings with an agent and would paralyse business.

The case is not only one of estoppel, but of warranty of title. The respondents by their secretary must be taken to have guaranteed the genuineness of the certificate issued with all due formalities: *Starkey v. Bank of England* [1903] (18), *County of Gloucester Banking Co. v. Rudry Merthyr Steam and House Coal Colliery Co.* [1895] (14), and *Duck v. Tower Galvanising Co.* [1901] (15). *Whitechurch v. Cavanagh* [1901] (16) was a case of certification, not of a certificate, and therefore is inapplicable.

[They also referred to *Bank of Ireland v. Evans's Trustees* [1855] (17), *Mahony v. East Holyford Mining Co.* [1875] (18), *Thorne v. Heard* [1895] (19), and *Knights v. Wiffen* [1870] (20).]

Sir R. B. Finlay, K.C., Bankes, K.C., and Bremner, for the respondents, were not heard.

The House took time for consideration.

The LORD CHANCELLOR (Lord LOREBURN): In this case Mr. Justice KENNEDY gave judgment in favour of the plaintiffs, but stated that his decision was governed entirely by the authority of a previous case, and that his own opinion was in favour of the defendants. The Court of Appeal gave judgment in favour of the defendants, and in my opinion they arrived at a right conclusion.

The question arises out of the fraud and forgery of a man named

(13) [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 8 Com. Cas. 142.

(14) 2 Manson, 223; [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486.

(15) [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847.

(16) 9 Manson, 351; [1902] A. C. 117; 71 L. J. K. B. 400; 85 L. T. 349; 50 W. R. 218.

(17) 5 H. L. C. 389; 3 W. R. 573.

(18) L. R. 7 H. L. 869; 33 L. T. 338; I. R. 9 C. L. 306.

(19) [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 Rep. 264.

(20) L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 23 L. T. 610; 19 W. R. 244.

Rowe. Rowe was secretary of the defendant company. He applied to the plaintiffs, who are stockbrokers, to procure for him a loan of 20,000*l.* in order to enable him to purchase 5,000 shares in the defendant company. Accordingly the plaintiffs arranged with a firm of bankers to advance the money upon a transfer of the shares to their names. Rowe forged a transfer in the name of one Story as transferor. The transfer was duly executed by the bankers as transferees, and then the plaintiffs delivered it to Rowe in exchange for a certificate. The certificate purported to state that the bankers were the registered proprietors of 5,000 shares; it purported to be signed by two directors; the seal was affixed to it, and it was countersigned by Rowe himself as secretary. In fact, the names of the two directors were forged by Rowe, and the company's seal was affixed by Rowe fraudulently, and not for or on behalf of or for the benefit of the defendant company, but solely for himself and for his own private purposes and advantage. Upon this the bankers advanced 20,000*l.* When the fraud was discovered the plaintiffs were obliged to repay to the bank the sum of 20,000*l.*, and brought this action against the defendant company upon the ground that they were liable for the fraud of Rowe. The only other circumstance needing notice is that Rowe was admittedly a proper person to deliver certificates on behalf of the company.

I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Another ground was pressed upon us—namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was he held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant

company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or with the issue of the document.

No precedent has been quoted in support of the plaintiffs' contention except the case of *Shaw v. Port Philip Gold Mining Co.* (3). I agree with Lord Justice STIRLING in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was in fact held out as having authority to warrant the genuineness of a certificate. If that be not so, then in my opinion the decision cannot be sustained.

For these reasons the judgment of the Court of Appeal ought in my view to be affirmed.

Lord MACNAUGHTEN: This case was argued at some length and with much ingenuity by the learned counsel for the appellants. In my opinion there is nothing in it.

Ruben and Ladenburg are the victims of a wicked fraud. No fault has been found with their conduct. But their claim against the respondent company is, I think, simply absurd. The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple, and every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so. Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company's office and was uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company. I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as if it were a dangerous beast and as if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by the case of *Bank of Ireland v. Trustees of Evans's Charities* (17) in this House.

Of all the numerous cases that were cited in the opening, none, I think, is to the point but *Shaw v. Port Philip Gold Mining Co.* (8), and that, as it seems to me, cannot be supported unless a forced and unreasonable construction is to be placed on the admissions which were made by the parties in that action.

I think the appeal must be dismissed with costs.

Lord DAVEY: To use the language of a distinguished Judge of the last generation, the appellants' case seems to me as full of holes as a colander. There is not a step in their title which is not tainted with fraud going to the root of it. Story, whose name was used as a transferor, had not 5,000 shares to transfer, and his name was forged to the transfer. There were therefore no shares, and there was no transfer. The seal on the certificate was, indeed, a genuine impression of the company's seal, but it was placed there without any authority, and (as concisely stated by Lord LINDLEY in his work on companies) "a document of that kind, if there is any intent to defraud, is a forged instrument." The signatures of the two directors who purported to countersign were also forgeries.

The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the

transaction did it come before the board of directors, which alone was entitled to speak and act for it. It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition the appellants slide into another and a very different one, that it was the secretary's duty to warrant on behalf of the company the genuineness of the documents he delivered. There is no evidence that any such duty or power was in fact entrusted to Rowe, and it is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents. But, even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the learned Judges in the Court of Appeal that every part of the legal proposition stated by Mr. Justice WILLES in his well-known judgment in *Barwick v. English Joint Stock Bank* (6) is of the essence of it. Mr. Justice WILLES's words are these: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification, I suppose, is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.

Finally, it is in my opinion open to serious doubt whether on the facts of the present case the parties relied on Rowe's representation at all. The evidence indicates that they refused to do so because they declined to part with their money on Rowe's certifying the transfer (as it is called), and if they acted in reliance on the certificate apart from any representation their case, of course, fails, for nobody can pretend that the certificate itself created any estoppel against the company.

I guard myself from expressing any opinion whether, even if the certificate had been genuine but issued under some innocent mistake, it would have been an estoppel in favour of the present

appellants. It will be remembered that the appellants themselves propounded the forged transfer to the company for registration of the supposed transferees' names. I share the doubt expressed by my noble and learned friend Lord MACNAUGHTEN in *Balkis Consolidated Co. v. Tomkinson* (4) "whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made to which he has in a sense and to a certain extent contributed." The recent decision of this House in *Sheffield Corporation v. Barclay* [1905] (21) may be found to have some bearing upon this point. It is, however, unnecessary to express any opinion upon it on the present occasion.

I am of opinion that the appeal should be dismissed.

Lord JAMES OF HEREFORD: Concurring as I do entirely in the judgments that have been delivered by my noble and learned friends, I do not propose to add to them except to make one observation. This is one of the cases in which it is said that one of two innocent persons must suffer. I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious and to be shaken in their confidence in respect of the validity of those certificates. But in this case the transferee has a safeguard which a company has not. A company cannot protect itself against the frauds of its secretary, and if the company has to bear the burden of this loss, of course the loss placed upon companies will be very great, and they must guard against it; but certainly theoretically—I do not know whether it is quite the case practically—the transferee has a safeguard: he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate, of course, is valid; if the answer is, "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are

(21) 12 Manson, 248; [1905] A. C. 392; 71 L. J. K. B. 747; 93 L. T. 83; 54 W. R. 49; 69 J. P. 385; 10 Com. Cas. 287; 3 L. G. R. 992; 21 T. L. R. 642.

genuine or not, but at any rate there is that power if they choose to exercise it.

Lord ROBERTSON : I concur in the judgment proposed.

Lord ATKINSON : I also concur.

Appeal dismissed.

Solicitors : *Gilbert Samuel & Co.*, for Appellants.

Ashurst, Morris, Crisp & Co., for Respondents.

**IN RE EHRMANN BROS., LIMITED, ALBERT v.
EHRMANN BROS., LIMITED.¹**

1906, May 29, 30, 31. JOYCE, J.

Company—Debentures—Registration—Extension of Time—Proviso for Protection of Creditors—Unsecured Creditors' Rights—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14 and 15.

Where the time for registration of debentures has been extended by an order under section 15 of the Companies Act, 1900, containing the usual proviso for the protection of rights acquired prior to the date of actual registration, the assets which would come to the holders of such debentures on a winding-up if registered in proper time must be shared by them *pari passu* with unsecured creditors whose debts were in existence at the date of such registration.

In re Johnson & Co. (2) and *In re Anglo-Oriental Carpet Manufacturing Co.* (1) explained and followed.

HEARING on further consideration in a debenture-holders' action.

On 26 June, 1900, the defendant company was incorporated under the Companies Acts, 1862 to 1898. The articles of the company contained the usual powers of borrowing and raising money.

In 1900 it was resolved that a series of debentures should be created and issued. Of this series 5,800*l.* of debentures were issued prior to 1 January, 1901, and 7,250*l.* (making 13,050*l.* in all) were issued after 1 January, 1901.

(1) This case has since been reversed on appeal.

(2) 9 Manson, 307; [1902] 2 Ch. 101; 71 L. J. Ch. 576; 86 L. T. 791; 50 W. R. 482.

(3) 10 Manson, 207; [1903] 1 Ch. 914; 72 L. J. Ch. 458; 88 L. T. 391; 51 W. R. 634.

On 1 January, 1901, the Companies Act, 1900, requiring the registration within twenty-one days of debentures issued after that date, came into operation.

The debentures issued after 1 January, 1901, were by inadvertence omitted to be registered, but by an order of SWINFEN EADY, J., dated 24 July, 1903, and made pursuant to section 15 of the Companies Act, 1900, the time for registration was extended until 14 August, 1903. The order contained the usual proviso, "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered," with a further proviso preserving the rights of the new and old debenture-holders *inter se*.

On 1, 5, 6, and 7 August, 1903, the debentures issued since 1 January, 1901, were registered in accordance with the order.

On 15 October, 1903, the writ in this action was issued, and by an order of 6 November, 1903, a receiver and manager was appointed, and on 8 November, 1903, the company passed a resolution for voluntary winding-up.

On 18 February, 1904, the plaintiff, on behalf of himself and all other the holders of first mortgage debentures, obtained judgment before KEEKEWICH, J., against the defendant company. The judgment declared that the debenture-holders were entitled to a charge upon the undertaking and all the property of the company, and ordered, *inter alia*, the following inquiries: "(2) an inquiry at what dates respectively the several debentures directed to be registered by the said order dated the 24th July, 1903, were in fact registered; (3) an inquiry whether any and which of the unsecured creditors of the defendant company at the respective dates of registration aforesaid still remain unsatisfied." It was further ordered that Gonzalez Byass & Co., Limited, should be at liberty to attend on inquiries Nos. 2 and 3.

On inquiry 3 the Master found that certain bills, since assigned to Gonzalez Byass & Co., were debts of the company at a date prior to the registrations of August, 1903, and still remained unsatisfied. The assets available in the winding-up amounted to about 5,800*l.*, or about the amount of the debentures issued prior to 1 January, 1901.

Hughes, K.C., Gore-Browne, K.C., and E. Ford, for the holders of debentures issued after 1 January, 1901 :

When the debentures the time for the registration of which had been extended by the order of SWINFEN EADY, J., on 26 June, 1903, had once been registered, they would have become good as against all creditors of the company but for the proviso in the order that registration should be without prejudice to the rights of parties acquired prior to the time when such debentures should be actually registered. This proviso is in the common form first used in *In re Joplin Brewery Co.* [1901] (4), and adapted from the case of bills of sale.

In *In re Spiral Globe Co.* [1901] (5), as amended by the Court of Appeal in *In re Johnson & Co.* [1902] (2), SWINFEN EADY, J., declared that section 15 of the Companies Act, 1900, and section 14 of the Bills of Sale Act, 1878, were *in pari materia*. This proviso must therefore be taken to mean what it would mean in the case of a bill of sale, and can only be meant to save the rights of creditors who have at the date of actual registration something more than an unsecured debt, who have some specific charge, execution, or judgment in their favour. In *In re Abrahams & Sons* [1902] (6), BUCKLEY, J., expressly said that this proviso was put in in accordance with *Crew v. Cummings* [1888] (7) and *In re Parsons and Furber* [1893] (8), and was intended to protect the rights of execution creditors. Further, in the Court of Appeal, in *In re Johnson & Co.* (2), COZENS-HARDY, L.J., expressed a doubt whether this proviso would have any effect in protecting creditors who had not taken some proceedings to get a charge or security. In fact, this proviso gives nothing to creditors such as Gonsalez Byass & Co., who claim in respect of what was merely an unsecured debt at the date of registration. The proviso merely operates to preserve rights

(4) 8 Manson, 426; [1902] 1 Ch. 79; 71 L. J. Ch. 21; 85 L. T. 411; 50 W. R. 75.

(5) 9 Manson, 52; [1902] 1 Ch. 396; 71 L. J. Ch. 128; 85 L. T. 778; 50 W. R. 187.

(6) 9 Manson, 176; [1902] 1 Ch. 695; 71 L. J. Ch. 307; 86 L. T. 290; 50 W. R. 284.

(7) 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886; 36 W. R. 908.

(8) [1893] 2 Q. B. 122; 62 L. J. Q. B. 365; 68 L. T. 777; 41 W. R. 468; 4 Rep. 374.

acquired against the property of the company by execution, charge, or similar means in the interval before such registration had taken place. Suppose, indeed, the company had torn up their old debenture issue and issued new ones on or after the date of these registrations, these would have ranked prior to any unsecured debts then in existence; therefore, *à fortiori*, old debentures, in respect of money lent to the company previously but only newly registered, must rank before unsecured debts existing at the date of registration. Creditors who have a mere debt have legally no "right" at all against the company which this proviso can retain for them.

Badcock, K.C., and Ashton Cross, for Gonsalez Byass & Co.:

We rely not only on the proviso at the end of the order of SWINFEN EADY, J., but also on section 14 of the Companies Act, 1900 (9), which says that an unregistered debenture is void as against the liquidator and the creditors. When the winding-up comes you look at the rights of all parties. The proviso saves the rights of all parties who were creditors when the indulgence of the Court allowed

(9) Companies Act, 1900, s. 14, sub-s. 1 : "Every mortgage or charge created by a company after the commencement of this Act and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled capital of the company; or
- (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
- (d) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the Registrar for registration in manner required by this Act within twenty-one days

after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

Section 15: "A Judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or mis-statement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified."

registration, and who are still creditors. In *In re Anglo-Oriental Carpet Manufacturing Co.* [1908] (8), the circumstances were similar to those here except that the winding-up supervened before registration, and this makes no difference except that it causes the rights of all creditors to crystallise. What we are entitled to is to have first a division of the whole of the assets rateably between the debentures issued prior to 1 January, 1901, and those issued after that date and subsequently registered, and then a division of the amount which would have gone to these dilatory debenture-holders rateably between them and the creditors who were creditors at the dates of registration under the order.

Younger, K.C., and *Austen*, for the holders of the unimpugned debentures issued prior to 1 January, 1901, and for the directors.

Hughes, K.C., in reply :

It is only under the proviso, not under section 14, that the creditors can have any claim. Their rights under this proviso cannot be larger than those given if a new set of debentures had been issued in the place of those left unregistered. This the company was at liberty to do, as was determined in *In re Defries & Co., Limited, Bowen v. Defries & Co., Limited* [1908] (10).

Cur. adv. vult.

May 31.

Joyce, J. : This is a question of the meaning and effect of a condition imposed in an order of 24 June, 1908, enlarging the time for the registration of certain debentures under section 14 of the Companies Act, 1900, in accordance with section 15 of that Act. The condition runs thus: "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

If I were altogether unfettered by authority, I should have been disposed to say that the ordinary unsecured creditors did not acquire any rights against the holders of debentures unless they acquired rights against the property charged by the debentures. The form of the proviso or condition is taken from what is now the common form which was settled by the Court of Appeal in *In re Johnson*

(10) 12 Manson, 51; [1904] 1 Ch. 37; 73 L. J. Ch. 1; 52 W. R. 528.

& Co. (2). I think it clear from that case, and from *In re Anglo-Oriental Carpet Manufacturing Co.* (3), that Mr. Justice BUCKLEY was of an opinion contrary to that which I am disposed to take, and I think there are indications in the report of *In re Johnson & Co.* (2) that the form of the proviso previously used was altered very possibly with a view to such a case as this, and that it was intended to prevent the registration of debentures under section 15 from affecting in any manner whatsoever the position of persons who had become creditors before such registration was actually effected. At the same time I must admit that the result is rather startling, because, as counsel for the holders of the impugned debentures pointed out, a new set of debentures issued and properly registered at or even subsequently to the date at which these debentures were registered would have acquired a good charge and would be entitled to be paid in priority to the unsecured creditors existing at that date. However, I do not see my way to differ from what I understand to be the opinion of Mr. Justice BUCKLEY, and I must therefore hold that creditors before the dates of the registration of debentures come in *pari passu* with the debentures registered on those dates. It was suggested in the reply that the case of *In re Anglo-Oriental Carpet Manufacturing Co.* (3) turned upon the fact that there was a winding-up order before the actual registration of the debentures. On looking at that case I am satisfied that, if Mr. Justice BUCKLEY was right, it made no difference whether the registration was before or after the winding-up. Costs so far as occasioned by inquiries 2 and 8 must come out of the fund divisible between the creditors and the debentures registered under the order of 24 June, 1908.

Solicitors : *Harris, Chetham & Cohen*, for Plaintiff and Holders of Registered Debentures.

Tamplin, Tayler & Joseph, for *Gonsalez Byass & Co.*
Nordon, De Frece & Drury, for Holders of Debentures issued before 1 January, 1901, and for Directors.

IN RE LEES BROOK SPINNING CO.

1906, May 26, June 1. SWINFEN EADY, J.

Company—Reduction of Capital—Capital in Excess of Wants of Company—Return of Capital—Procedure—Form of Minute—Companies Acts, 1862 (30 & 31 Vict. c. 131), ss. 9 and 15; and 1877 (40 & 41 Vict. c. 26), ss. 3 and 4.

A company limited by shares duly passed a special resolution in accordance with section 51 of the Companies Act, 1862, reducing its capital from 80,000*l.* in 16,000 shares of 5*l.* each (2*l.* 10*s.* paid up) to 32,000*l.* in 16,000 shares of 2*l.* each, of which 1*l.* was to be deemed paid up, the reduction to be effected by returning to the shareholders 1*l.* 10*s.* per share, of which 1*l.* might be called up again:—

Held, on petition, that an order confirming the reduction could be made, although the 1*l.* 10*s.* per share had not yet been returned, and that the proper minute to approve for registration was one which, after stating the reduced capital, contained the words “At the time of the registration of this minute the sum of 1*l.*, and no more, is proposed to be deemed to have been paid up on each of the said shares.”

In re Calgary and Edmonton Land Co. (1) not followed.

PETITION for reduction of capital.

The company was incorporated in 1884 under the Companies Acts, 1862 to 1883, as a company limited by shares with a capital of 80,000*l.*, divided into 16,000 shares of 5*l.* each, all of which had been issued and on each of which 2*l.* 10*s.* had been paid. The articles of association gave power to the company to reduce the capital by special resolution, *inter alia* by paying off or returning any part thereof upon the footing that the amount paid off or returned might be called up again.

By a special resolution under section 51 of the Companies Act, 1862, duly passed and confirmed at extraordinary general meetings held respectively on 12 January and 2 February, 1906, it was resolved to reduce the capital to 32,000*l.*, divided into 16,000 shares of 2*l.* each, with 1*l.* each paid up thereon and 1*l.* each uncalled, and to effect such reduction by returning to the holders of the 16,000 shares issued paid-up capital to the extent of 1*l.* 10*s.* per share, and by reducing the nominal amount of each of such shares from 5*l.* to 2*l.*

This petition was presented by the company for the confirmation

(1) *Ante*, p. 55; [1906] 1 Ch. 141; 75 L. J. Ch. 138; 94 L. T. 132.

by the Court of the special resolution and for the approval of the following minute:

"The capital of the Lees Brook Spinning Co. Limited, is henceforth 32,000*l.*, divided into 16,000 shares of 2*l.* each, instead of the original capital of 80,000*l.*, divided into 16,000 shares of 5*l.* each. At the time of the registration of this minute the sum of 1*l.* has been and is to be deemed to be paid up on each of the said shares."

No part of the 1*l.* 10*s.* per share had been returned when the petition was presented.

R. J. Parker, for the company:

The difficulty that arises as to the form of the minute has been caused by the decision of BUCKLEY, J., in *In re Calgary and Edmonton Land Co.* [1905] (1), to the effect that where a minute states the reduced capital in a case where the reduction involves a repayment to the shareholders, the Court cannot make an order approving it until the capital has in fact been repaid. That was a departure from a procedure long established and approved or adopted in numerous cases which are mentioned in Palmer's Company Precedents (9th ed.), Part I. pp. 1144, 1145.

What the order effects is—first, to confirm what has been decided on by the special resolution; and secondly, to approve a minute stating the amount of the capital as altered by the special resolution so confirmed. Till the order has been registered the special resolution is ineffective (Companies Act, 1867, s. 9 (2)), so that it is difficult to see how the company can act upon it. But the registration cannot be made till the minute has been approved and a copy produced to the Registrar: section 15 (2). After registration the

(2) Companies Act, 1867, s. 9:
"Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations, . . . as to reduce its capital; but no such resolution . . . shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter

mentioned."

Section 15: "The Registrar of Joint Stock Companies upon the production to him of an order of the Court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court) showing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares in

minute is to be substituted for the corresponding part of the memorandum of association : section 16. The procedure adopted by BUCKLEY, J., was "to make the order confirming the reduction and then allow the further hearing of the petition to stand over until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute showing, with respect to the capital as altered by the order, the particulars required by section 15 of the Companies Act, 1867, and section 4 of the Companies Act, 1877." The last-named section requires the minute to show, "in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share." The form in Palmer's Company Precedents (9th ed.), Part I. p. 1122, after stating the particulars required by section 15, runs, "At the time of the registration of this minute the sum of —l. has been and is to be deemed to be paid up on each of the said shares." The object of BUCKLEY, J., was to bring the facts into accordance with that wording.

[SWINFEN EADY, J.: If that means that that sum only has been paid up, it is open to the criticism that it is inaccurate. To omit "has been" and say "proposed to be deemed" would seem to meet Mr. Justice BUCKLEY's objection.]

Whatever the wording of the minute, it will become part of the memorandum of association.

[SWINFEN EADY, J.: Before departing from a reported decision I should like to consider the question. I propose to approve the reduction, and will give judgment in a few days.]

Cur. adv. vult.

June 1.

SWINFEN EADY, J., read the following judgment: This is a petition for confirmation of the reduction of capital, involving a

which it is to be divided, and the registration the special resolution con-
amount of each share, shall register firmed by the order so registered shall
the order and minute, and on the take effect. . . ."

return to the shareholders of 1*l.* 10*s.* per share, upon the footing that 1*l.* may be called up again, the shares being reduced from 5*l.* to 2*l.* with 1*l.* paid. Upon the evidence I have no difficulty in making an order confirming the reduction. A question, however, has been raised as to the form of the order and the minute. It has recently been decided by Mr. Justice BUCKLEY in *In re Calgary and Edmonton Land Co.* (1), that the Court cannot make the order approving the minute stating the reduced capital until the capital has in fact been reduced by the repayment, and that the proper procedure is to make the order confirming the reduction and then allow the further hearing of the petition to stand over until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute showing with respect to the capital, as altered by the order, the particulars required by section 15 of the Companies Act, 1867, and section 4 of the Companies Act, 1877. That procedure has been objected to in the present case, and it was urged that the company had no right to make any repayment of capital to shareholders until the sanction of the Court had been obtained, the order drawn up, passed, and entered, and the minute registered. By section 9 of the Companies Act, 1867, no resolution for reducing the capital of any company is to come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as thereafter mentioned. Section 15 provides that the Registrar, upon the production to him of an order of the Court confirming the reduction, and the delivery to him of a copy of the order and of a minute, approved by the Court, showing with respect to the capital of the company, as altered by the order, the amount of such capital, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect. The certificate of the Registrar is to be conclusive evidence that the capital of the company is such as is stated in the minute. By section 4 of the Companies Act, 1877, the minute required to be registered is to show, "in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share."

In my judgment, the Acts clearly contemplate that the order of the Court and the registration of the minute are to precede any repayment of capital. The resolution for reduction does not come into operation until after order made and minute registered, and the company is not entitled to make any repayment of capital to shareholders, except under and in pursuance of an effective resolution for reduction of capital. By section 3 of the Act of 1877 the power to reduce capital includes a power to pay off any capital in excess of the wants of the company. Again, the minute is to show the capital as altered by the order, and the amount "proposed to be deemed to have been paid up on each share." This means the amount which is proposed to be deemed to have been paid up after the alteration of the capital. The Companies Acts do not contemplate two orders being made on a petition for reduction, one a preliminary order sanctioning the reduction and the other an order approving the minute after the reduction has been carried into effect. Again, great difficulties in practice would arise if there were to be one order drawn up and post-dated after the reduction had been carried out. Some shareholders might be abroad or unable to be found, so that repayment of capital could not be made to them; others, perhaps, dead, without legal personal representatives; possibly disputes existing as to the ownership of other shares; and the Acts do not contain any provisions for dealing with the amount payable to such persons so as to make any particular disposition by the company of the amount of their capital equivalent to repayment to them. Moreover, the company would be paying off capital not only before the resolution had become effective, but before it was known whether there would be an appeal from the order confirming the reduction. I prefer to adhere to the practice which prevailed before the recent decision of Mr. Justice BUCKLEY, and which is fully stated in Palmer's Company Precedents (9th ed.), Part I. pp. 1144, 1145, where numerous precedents of orders are referred to. I make the order confirming the reduction in the usual form.

The minute will be as follows: "Minute approved by the Court.—The capital of the Lees Brook Spinning Co., Limited, is henceforth 32,000*l.*, divided into 16,000 shares of 2*l.* each, instead of the original capital of 80,000*l.*, divided into 16,000 shares of 5*l.*

each. At the time of the registration of this minute the sum of 1*l.*, and no more, is proposed to be deemed to have been paid up on each of the said shares."

Solicitors: *Wrigley, Claydon & Trustram, Oldham.*

NEWTON v. BIRMINGHAM SMALL ARMS CO.

1906, June 20, 27. BUCKLEY, J.

Company — Accounts — Audit — Balance-sheet — Reserve Fund not disclosed by Balance-sheet — Auditors not to disclose Information — Duty of Auditors — Ultra Vires — Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 21 and 23.

Sections 21 and 23 of the Companies Act, 1900, require by implication that there shall be annually an audit of the accounts of a company resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better; and a balance-sheet so worded as to show that there is an undisclosed asset, the existence of which makes the financial position better than is shown, is not necessarily inconsistent with the Act.

The statutory majority of shareholders may resolve that as to particular items of the company's business it is to the company's interest that there shall be secrecy, and that the auditors shall not disclose them to the shareholders unless their duty under the Act requires it; and it is a compliance with the Act if the auditors report that they have examined the accounts as to those items and are satisfied with them, and that the funds have been employed in manner authorised by the company's regulations, provided the auditors are *bona fide* satisfied that in making this report and nothing further they are truly reporting as to the true and correct view of the state of the company's affairs.

But it is inconsistent with the Act that the auditors should be bound, even when they think that the true state of the company's affairs is affected by facts relating to the undisclosed funds, to withhold all information with regard to them from the shareholders; and any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which the Act requires them to make as to the true and correct state of the company's affairs are inconsistent with the Act.

At extraordinary general meetings of a company there were carried and confirmed special resolutions for the formation of an internal reserve fund which need not be shown in or disclosed by the balance-sheet, and as to which the directors need not give any information to the shareholders. The directors were to have an absolute discretion as to the investment of

the fund, and as to its application for any purpose serving, protecting, or advancing the interests of the company or preserving or promoting the value of the company's undertaking, assets, or goodwill. The fund and all particulars relating to it were to be disclosed to the auditors, whose duty should be to see that it was applied for the purposes of the company as above mentioned, but not to disclose any information with regard to it to the shareholders or otherwise:—

Held, that, in regard to the last-mentioned provision, the resolutions went too far, and that the company must be restrained from acting upon them.

ACTION.

The company was incorporated in 1896 as the Birmingham Small Arms and Metal Co., a name changed to that of the Birmingham Small Arms Co. in 1897. Its objects were the acquisition of the undertaking of an existing company and the carrying on of the business of manufacturers of and dealers in ordnance and other firearms, explosives, and ammunition, and also of machinists, tube manufacturers, &c., and generally to do all things incidental or conducive to the attainment of its objects.

The capital was 600,000*l.*, divided into 79,870 ordinary shares of 5*l.* each, and 40,630 preference shares of 5*l.* each.

The articles excluded Table A of the Companies Act, 1862. They provided that a balance-sheet containing a summary of the property and liabilities of the company should be laid before the ordinary meeting in every year accompanied by a report, and for an examination of and report on the balance-sheet by auditors. They also provided that the directors might, but should not be obliged to, set aside out of profits such sum as they might think proper to form a reserve fund, the provisions as to which were contained in articles 132 and 133. The fund was thereby declared applicable to meet contingencies or depreciation in the value of the property of the company, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, providing against losses, meeting claims on or liabilities of the company, or for such other purposes as the directors should in their absolute discretion think conducive to the interests of the company. The fund might be invested on such securities (other than the shares of the company) as the directors might think proper.

On 13 January, 1906, the company gave notice to the shareholders of an extraordinary general meeting to be held on 24 January for

the purpose of considering, and if thought fit passing, the following special resolution :

“ That the articles of association of the company be, and they are hereby, altered as follows :

“ (1) By the insertion after article 138 of the following article :

“ ‘ 138A. In addition and without prejudice to the powers conferred by articles 132 and 138, the directors may in any year in which they shall recommend a dividend to be paid on the ordinary shares of the company of not less than 10 per cent. on the amount paid up thereon set aside (without disclosing the fact) out of the earnings or profits in such year remaining after providing the amount necessary to pay the dividends payable on preference shares, and the dividend which they recommend on the ordinary shares, such a sum as they may deem necessary or desirable in the interest of the company as an internal reserve fund, or as an addition to such internal reserve fund when formed, which internal reserve fund shall be held upon the terms and for the purposes following, that is to say :

“ ‘ (a) The internal reserve fund shall be separate from the reserve fund under article 132, and need not be shown in or disclosed by the balance-sheet, and the directors need not give any information to the shareholders as to the amount, investment, or application thereof, or otherwise in relation thereto, either in their report or otherwise.

“ ‘ (b) Such internal reserve fund may be invested upon such investments (other than the shares of the company) as the directors may in their absolute discretion think fit, without their being liable for any depreciation of or loss in consequence of such investments, whether the same be usual or authorised investments for trust funds or not.

“ ‘ (c) Such internal reserve fund may be used and applied at the discretion of the directors for any purpose for which the ordinary reserve fund is available, or for any purposes which the directors in their absolute discretion may consider will serve, protect, or advance the interests of the company, or preserve or promote the value of the undertaking, assets, or goodwill of the company.

“ ‘ (d) The directors shall disclose the internal reserve fund and the amount thereof and all additions thereto and all other particulars

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in respect of the said fund to the auditors of the company appointed by the shareholders, whose duty shall be to see that the same is applied for the purposes of the company in accordance with the provisions hereinbefore contained, but not to disclose any information with regard to the same to the shareholders or otherwise.' "

There were also proposed consequential amendments of articles dealing with shareholders' rights to inspect the accounts and books of the company, the laying of the balance-sheet before the annual general meeting, the report, and the auditors' report on the balance-sheet.

The notice to the shareholders was accompanied by a circular letter from the secretary, pointing out the advantages of the proposed internal reserve fund and inclosing a form of proxy.

The resolutions were carried at the meeting on 24 January, and were confirmed at a second extraordinary general meeting, held on 21 February, 1906.

On 10 May, 1906, Sir A. J. Newton, who held forty ordinary shares in the company, commenced this action against the company on behalf of himself and all other shareholders, claiming a declaration that the resolution for the creation of the internal reserve was *ultra vires* and invalid, and an injunction restraining the company and directors from acting upon it.

The action came on for trial without pleadings.

Buckmaster, K.C., and H. K. Newton, for the plaintiff :

The shareholders have a right to proper accounts and balance-sheet, just as partners in a concern have, and to a proper audit of the accounts, and it is the duty of the directors, apart from any statutory provision, to furnish such accounts, since they manage the concern for the benefit of all the shareholders : *In re Forest of Dean Coal Mining Co.* [1878] (1). And since the Companies Act, 1900, an audit has further been required by statute, sections 21—28 of that Act (2) containing provisions, applicable to the accounts

(1) 10 Ch. D. 450; 40 L. T. 287; 27 W. R. 594.

(2) Companies Act, 1900, s. 21, until the next annual general meeting.
sub-s. 1: "Every company shall at each annual general meeting appoint an auditor or auditors to hold office

Sub-section 2: "If an appointment of auditors is not made at an annual

of all companies, which are very nearly identical with those applied to the accounts of banking companies by section 7 of the Companies Act, 1879 (3). Statutory provisions for the benefit of

general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services."

Sub-section 3 : "A director or officer of the company shall not be capable of being appointed auditor of the company."

Sub-section 5 : "The directors of a company may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act."

Section 22 : "The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed . . . to fill any casual vacancy may be fixed by the directors."

Section 23 : "Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors, and the auditors shall sign a certificate at the foot of the balance-sheet stating whether or not all their requirements as auditors have been complied with, and shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office; and in every such report shall state whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the com-

pany's affairs as shown by the books of the company; and such report shall be read before the company in general meeting."

(3) Companies Act, 1879, s. 7, sub-s. 1 : "Once at least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

Sub-section 2 : "A director or officer of the company shall not be capable of being elected auditor of such company."

Sub-section 3 : "An auditor on quitting office shall be re-eligible."

Sub-section 4 : "If any casual vacancy occurs in the office of any auditor, the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship."

Sub-section 5 : "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company"

Sub-section 6 : "The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance-sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and

shareholders cannot be taken away from them by articles: *In re Peveril Gold Mines, Limited* [1897] (4), and *Paine v. Cork Co.* [1900] (5); and on behalf of the plaintiff it is contended that the proposed new article does take away the shareholders' statutory rights in regard to audit. Under it the shareholders will not know if there has been misfeasance in regard to the internal reserve, though it is the auditor's statutory duty to tell them, and the article therefore really may compel the auditor to commit a misdemeanour, against the consequences of which the article and special resolutions would not protect him. It is the duty of auditors to place before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it: *In re London and General Bank, Limited* [1895] (6), a case decided under section 7 of the Act of 1879. In that case RIGBY, L.J., expressly says that the articles cannot absolve the auditors from any obligation imposed upon them by statute; and LINDLEY, L.J., says that auditors must not give the shareholders only so much information as is calculated to make them ask for more. The article is *ultra vires*, and the resolutions are inoperative.

Sir R. B. Finlay, K.C., and R. J. Parker, for the company:

The real question is, no doubt, whether the resolutions contain anything inconsistent with the due performance by the auditor of his duty. There is no common law obligation, and apart from the Companies Act, 1900, no statutory obligation, on a company to keep a balance-sheet or publish any accounts; and section 28 of that Act does not render a balance-sheet obligatory.

fair balance-sheet properly drawn up,
so as to exhibit a true and correct view
of the state of the company's affairs
as shown by the books of the company;
and such report shall be read before
the company in general meeting."

Sub-section 7: "The remuneration
of the auditor or auditors shall be
fixed by the general meeting appointing
such auditor or auditors, and shall
be paid by the company."

(4) 4 Manson, 398; [1898] 1 Ch. 122; 67 L. J. Ch. 77; 77 L. T. 505; 46 W. R. 198.

(5) 7 Manson, 225; [1900] 1 Ch. 308; 69 L. J. Ch. 156; 82 L. T. 44; 48 W. R. 325.

(6) 2 Manson, 555; [1895] 2 Ch. 673; 64 L. J. Ch. 866; 73 L. T. 304; 44 W. R. 80; 12 Rep. 520.

[BUCKLEY, J.: Does it not do so inferentially? The auditor is required by the section to sign a certificate at the foot of the balance-sheet, which implies that there must be one.]

At all events the section does not require the balance-sheet to be laid before the company in general meeting, though the auditor may have to see it in order to arrive at the company's true financial position. The shareholders might by the articles waive altogether the keeping of a balance-sheet, and *a fortiori* they may by the articles limit its contents to certain specified matters, and so dispense with it up to such point as they think fit. As to the suggestion that shareholders have a right like that of partners to the production of a balance-sheet, partners may contract themselves out of such a right, and therefore shareholders may do the same. It is not in the shareholders' own interests expedient to disclose everything relating to the company's affairs. The objects to which the secret reserve may be devoted must no doubt be objects authorised by the memorandum of association, but within those limits there is nothing illegal in a provision allowing the directors to choose from among those objects, and that is all that the article does. The internal reserve itself is only a means of doing directly and openly what many companies do indirectly by undervaluing assets to cover such an internal reserve. It is not usual in any company to submit the profit and loss account to shareholders; and the company in the present case has a perfect right, with the assent of the shareholders, to provide that after the payment of the dividend the profit and loss account shall be debited with the sum carried to this secret internal reserve. As to the position of the auditor in regard to it, section 28 of the Act of 1900 is satisfied if he certifies that the balance-sheet submitted to the shareholders shows the true financial position of the company, except that the internal reserve is omitted from it in accordance with the articles; but that he has gone into the accounts, and that that reserve, full particulars of which have been disclosed to him, has been properly expended on objects advancing the interests of the company. The article will be construed in such a way as to limit its meaning by the provisions of the section; and the section allows the auditor to make a certificate in some such form as the

above as to matters with which he is satisfied, though of course it is his duty to inform the shareholders of everything wrong in the accounts that he discovers. But he is merely bound to say that the balance-sheet does or does not exhibit a true view of the affairs; he is not bound to go into all the details of the company's affairs.

Buckmaster, K.C., replied.

Cur. adv. vult.

June 27.

BUCKLEY, J.: In February last this company passed special resolutions the short substance of which is that the directors may, under defined circumstances, set aside (without disclosing the fact) out of the profits sums to form an "internal reserve fund"—a sort of secret service fund—and that this fund need not be shown in or disclosed by the balance-sheet, and no information need be given to the shareholders as to its amount, investment, or application; that the directors may invest it as they think fit without being liable for loss in consequence of such investments; that they may apply it for any purposes which they consider will advance the interests of the company; and that, while the particulars as to this fund are to be disclosed to the auditors, it is to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise.

The question for decision is whether, having regard to sections 21—23 of the Companies Act, 1900, these special resolutions are *ultra vires*. The Companies Act, 1862, was silent as to accounts. Table A (which the company might or might not adopt as it chose) contained provisions on the subject; but otherwise the Act left the matter untouched, relying, no doubt, upon the application of the ordinary principles applicable as between partners, and proceeding upon the footing that the members of a company under the Act are partners in a special sort of partnership modified and governed by statutory provisions. The Companies Act, 1879, s. 7, contained, for the first time, provisions as to audit of accounts, and was confined to banking companies registered after 1879 as limited companies. The Companies Act, 1900, ss. 21—23, for the first time contained provisions as to the audit of the accounts of other companies under these Acts. The provisions of the Act of 1879

and those of the Act of 1900 are closely similar, though not the same, so similar, indeed, that the reason for the difference is hard to seek. The principal differences that I trace are that the Act of 1879 does, while the Act of 1900 does not, provide affirmatively for an annual audit, and that the Act of 1879 does, while the Act of 1900 does not, provide that if there is no auditor a meeting shall be forthwith called to elect an auditor. As regards the former of the differences, I think that the Act of 1900, though it does not do so expressly, yet does impliedly provide for an annual audit. Section 21, sub-section 1, requires the annual appointment of an auditor to hold office for one year, and the Act contemplates that he will audit during his tenure of office. There will thus result an annual audit. As regards the latter difference, I find that section 21, sub-section 2, provides for the appointment of an auditor by the Board of Trade, on the application of any member, in case an auditor has not been appointed at the annual meeting. Neither statute contains any provision in favour of the public in the matter of publication of the accounts. The two statutes really do not differ, I think, in substance in their result.

The question is how far the Act of 1900 goes in requiring for the protection of the members that the accounts shall be open to audit, and that the report on them shall be made to the members. The defendants do not dispute that, if and so far as the special resolutions are inconsistent with the Act, the Act must prevail. The concluding sentence of section 23 requires that the auditor shall state whether the balance-sheet exhibits a true and correct view of the state of the company's affairs as shown by the books. Counsel for the company argued that these words are satisfied if the auditors report that the balance-sheet does not exhibit a true view, and that the statute does not in these words say that they shall report what is the true view. This is logically true as regards the language, but, in my judgment, the statute is saved from the reproach of having achieved no more than this impotent result by words earlier in that section, which provide that the auditors are to report to the shareholders on the accounts. A report upon the accounts involves a report of the result of the accounts, and this necessarily involves, as matter of substance if not of form, the statement of a balance-sheet or the equivalent of a balance-sheet. There are, I agree, in

the Act of 1900 no affirmative words to the effect of what I am about to state, but I think the language of the Act is sufficient to show that by implication it requires that there shall be annually an audit of accounts resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The special resolutions in the present case provide that the balance-sheet shall not disclose the internal reserve fund. It must therefore omit on the assets side of the balance-sheet the assets which make up the amount standing to the credit of that fund and the *contra* item—namely, the credit balance of the fund—on the liability side. The result will be to show the financial position of the company to be not as good as in fact it is. If the balance-sheet be so worded as to show that there is an undisclosed asset the existence of which makes the financial position better than shown, such a balance-sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probably real value. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance-sheet is not, I think, necessarily fatal to the special resolutions. The Act, however, provides that the auditors shall report to the shareholders on the accounts examined by them. These auditors will examine, among others, the accounts of the internal reserve fund. A principal question in this case, I think, is whether it is a compliance with these words of the Act that the auditors shall report that they have examined the accounts as to the internal reserve fund, that they are satisfied with them, and that the funds have been employed in manner authorised by the company's regulations, or whether there will be default in complying with the Act if they do not go on to say how the fund has been employed. In my judgment such a report would be a sufficient report within the Act if the auditor is *bonâ fide* satisfied that in making this report, and nothing further, he is truly reporting as to "the true and correct view of the state of the company's affairs."

But the special resolutions do not stop there. They provide that it shall be the duty of the auditor not to disclose any information

with regard to this fund to the shareholders or otherwise. It is, I think, inconsistent with the Act of Parliament that the auditor shall be bound, even when he thinks that the true state of the company's affairs is affected by facts relating to the internal reserve fund, to withhold all information with regard to the same from the shareholders. If, for instance, the directors had invested the internal reserve fund upon investments which might involve the company under certain circumstances in enormous loss, the Act, I think, requires that the auditor shall be at liberty and be bound to report that fact. In reporting upon the accounts submitted to them the auditors do not, of course, report as to the details of the accounts to which they find no cause to take exception. Their duty is to call attention to that which is wrong, not to condescend upon all the details of that which is right. It is, I think, competent to the statutory majority of the shareholders to say that as to particular items of their business it is to the interest of the corporation that there shall be secrecy, and that the auditors, who must for the purposes of their audit know all such details, shall not, unless their duty under the statute requires it, disclose such details to the members.

There is no suggestion in this case that these clauses are intended to be used for any other than a legitimate purpose. Those who are engaged in commerce are familiar with the fact that undue publicity as regards the details of their trade, or as to their financial arrangements, may often be injurious to traders, having regard to the rivalry of competitors in trade, to complications sometimes arising from strained relations between capital and labour, and the like. There are legitimate reasons for ensuring secrecy to a proper extent. It is not, I think, necessary, nor, having regard to the great utility of these Acts, is it desirable, to expose persons who trade under these Acts to the necessities of a publicity from which their competitors are free unless such publicity is required to ensure commercial integrity. I am not disposed to look too closely for reasons why I should find clauses such as these to be inconsistent with the Act if I see that the true purpose of the Act is satisfied. I think, however, these special resolutions go too far. Any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as materials

for the report which under the Act they are to make as to the true and correct state of the company's affairs are, I think, inconsistent with the Act.

The defendants have left me in some doubt as to the exact position which they take up in the matter. They have desired to obtain the opinion of the Court upon the general question under the Act. They are entitled to do so, and this judgment, I hope, will put them in possession of my views on the subject; but I am not clear whether they threaten and intend to act upon the resolutions as they stand. They say truly that, as regards the details of the resolutions, when they know the view of the Court upon the Act of Parliament they can by further special resolutions alter their scheme so as to make it consistent with that view. There are no pleadings, so that it is only from the attitude of the defendants at the Bar that I can ascertain whether they threaten and intend to do the act against which an injunction is sought. It is not according to the practice of the Court to enjoin an act unless the defendants threaten and intend to do it. I postpone, therefore, for the moment the question of the exact form of the order, so that I may hear what the defendants have to say.

[After some discussion his Lordship granted an injunction restraining the company from acting on the resolutions, and ordered the company to pay the costs.]

Solicitors : *Boxall & Boxall*, for Plaintiff,

Sharpe, Parker, Pritchards, Barham & Lawford, agents
for *Ryland, Martineau & Co.*, Birmingham, for
Company.

SHEPHEARD v. BRAY.

1906, May 14, 15, 16, 81; July 17. WARRINGTON, J.

Company — Prospectus — Untrue Statement — Compensation — Contribution — Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), ss. 3 and 5.

Directors of a company issued a prospectus which contained an untrue statement that the only contracts to which the company was a party were two, omitting a third which was material to be disclosed. An action against some of the directors was brought, and judgment obtained, by a shareholder who had taken shares on the faith of the prospectus, for compensation for loss or damage sustained by reason of the untrue statement under section 3 of the Directors' Liability Act, 1890. After appeal to the House of Lords, where the judgment of the Court of Appeal, affirming the judgment of the Court below, was affirmed, a compromise was arrived at between the parties to the action under which the shareholder was to receive an agreed sum of 300*l.* by way of compensation or damages, the taxed costs of an inquiry which had been begun, but was agreed not to be further proceeded with, and 700*l.* for additional costs. The amounts were paid, together with the taxed costs of the action and appeals, by the present plaintiffs, who were some of the directors, and who contributed to the payment in equal shares. A number of other similar actions were commenced or claims made against the present plaintiffs, of which some were compromised; in others judgment was entered by consent for an inquiry as to damages; in others money was paid into Court to answer the claims. In respect of these, the present plaintiffs had paid or become liable to pay large sums, and incurred considerable costs and expenses. They commenced this action under section 5 of the Directors' Liability Act against their co-directors and the representatives of deceased co-directors for contribution to the payments they had made or become liable for, and to the costs and expenses they had incurred, and to their own solicitor and client costs and reasonable expenses:—

Held, that they were entitled to contribution to (1) sums paid for compensation for loss or damage, (2) taxed costs of the plaintiff in the original action up to and including judgment, and (3) costs paid to other claimants (whether under judgment in actions or agreement), but not (4) the additional costs of the plaintiff in the original action, nor (5) the present plaintiffs' own costs in that action, nor (6) costs in the Court of Appeal and the House of Lords.

ACTION.

By the writ issued 21 June, 1904, the plaintiffs, who were Alfred James Shepheard, Paul Speak, Sir William Farmer, Hon. Richard Cecil Grosvenor, Hon. Cecil Marcus Knatchbull-Hugessen, Batty Langley, and Charles Guy Pym, claimed a declaration that the defendants George Bray (since deceased), Edward Overend Simpson, Samuel Butler, John William Wade (the last-named three being the executors of Isaac Gaunt), Sir Robert MacConnell, Hugh Mack,

William Don Gillies, Violet Emma Oswald (being the executrix of William Walter Oswald), and Charles Darley Clayton were liable to contribute to any sums which the plaintiffs or any of them had paid or were liable to pay to the plaintiff in an action of *Broome v. Speak* [1902] (1), and to the plaintiffs in a hundred and twenty-two other actions which had been brought against the plaintiffs or some of the plaintiffs in this action, under the provisions of the Directors' Liability Act, 1890 (2), directors of the London and Northern Bank, Limited, and as having authorised the issue of a prospectus offering shares of the company for subscription. After Bray's death the action was ordered to be continued against his executors.

The statement of claim alleged that in 1898 the plaintiffs and the defendants other than the executors of Isaac Gaunt and the executrix of W. W. Oswald, together with Isaac Gaunt and W. W. Oswald, being the directors of the London and Northern Bank, Limited, which was incorporated under the Companies Acts, issued a prospectus by which the public were invited to subscribe for 25,000 preference and 125,000 ordinary shares of 10*l.* each in the company. The prospectus contained, *inter alia*, a statement that the only contracts to which the company was a party were two dated respectively 9 May and 26 September, 1898. The statement was untrue. In December, 1901, the action of *Broome v. Speak* (1) was

(1) 10 Manson, 38; [1903] 1 Ch. 586; 71 L. J. Ch. 716; 72 L. J. Ch. 251; 88 L. T. 580; 50 W. R. 614; 51 W. R. 258. On appeal, *sub nom. Shepheard v. Broome*, 11 Manson, 283; [1904] A. C. 342; 73 L. J. Ch. 608; 91 L. T. 178; 53 W. R. 111; 20 T. L. R. 640.

(2) Directors' Liability Act, 1890, s. 3: "Where after the passing of this Act a prospectus . . . invites persons to subscribe for shares in . . . a company, every person who is a director of the company at the time of the issue of the prospectus . . . and every person who, having authorised such naming of him, is named in the prospectus . . . as a director of the company or as having agreed to become a director, . . . shall be liable to pay compensation to all persons who shall subscribe for any shares . . . on the faith of such prospectus . . . for the loss or damage they may have sus-

tained by reason of any untrue statement in the prospectus . . . unless certain things are proved.

Section 5: "Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus . . . has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment."

commenced against the plaintiffs Speak and Shepheard and the defendant Clayton by a shareholder, who had subscribed for and been allotted 400 shares on the faith of the prospectus, for compensation for loss sustained by reason of the untrue statement. BUCKLEY, J., and, on appeal, the Court of Appeal and the House of Lords, held the shareholder entitled to succeed both under section 38 of the Companies Act, 1867, and under the Directors' Liability Act, 1890 (2). After the decision of the House of Lords the parties in *Broome v. Speak* (1) arrived at a compromise under which Speak, Shepheard, and Clayton, in lieu of proceeding further with an inquiry which had been ordered, agreed to pay Broome 800*l.*—that is, 15*s.* per share—for compensation or damages and his taxed costs of inquiry, and 700*l.* in respect of additional costs, the compromise being expressed to be in full settlement of Broome's claim under the prospectus against all the directors. The present plaintiffs had paid Broome the 800*l.* and the taxed costs of the action, appeals, and inquiry, and the 700*l.* for additional costs, contributing in equal shares. They further had contributed, or admitted liability to contribute, to Speak's and Shepheard's own costs and expenses in *Broome v. Speak* (1). In addition to *Broome v. Speak* (1), a large number of other actions had been commenced or claims made against the present plaintiffs or some of them by persons who had subscribed on the faith of the prospectus; some of the actions and claims had been compromised, judgment by consent had been entered for an inquiry as to damages in others, and money had been paid into Court to answer the claims in others. The present plaintiffs having thus paid or become liable to pay large sums (including two sums of 500*l.* paid to the Joint Stock Association for services rendered in settlement of claims), and having incurred considerable costs and expenses, to all which they had contributed or admitted liability to contribute in equal shares, now alleged that the defendants (or the legal representatives of any of them respectively) would, if sued separately, have been liable to make the same payments as they had made, or become liable to make, under the provisions of the Directors' Liability Act, 1890 (2), by reason of the untrue statement in the prospectus; and in this action they claimed rateable contribution from the defendants to such payments accordingly, and also to all solicitor

and client costs and reasonable expenses of the plaintiffs, or any of them, in connection with the action of *Broome v. Speak* (1) and the other actions and claims.

The defendants MacConnell and Mack had agreed to pay their proportionate shares, and did not appear. The defendant Gillies came to a settlement with the plaintiffs during the course of the arguments. The estate of W. W. Oswald was insolvent, and the defendant Clayton had contributed a portion of his share and was insolvent.

Astbury, K.C., and Cassel, for the plaintiffs:

The facts of this case are the same as those of *Broome v. Speak* (1), and the question at issue turns on section 5 of the Directors' Liability Act, 1890 (2). The plaintiffs must establish, first, that they were liable to make payments under section 3 of the Act, and, secondly, under section 5, that the defendants would have been liable to make the same payments. The plaintiffs acted reasonably in regard to the claims made by shareholders, and, at any rate, it does not lie in the mouth of the defendants to deny that they did. Apart from the Act, there is no right or liability of contribution in respect of a tortious act. The statutory liability, created by section 3, to pay compensation gives the directors a contractual right to contribution *inter se*, which survives in the case of the death of any one of them against his executors: Leake on Contracts (5th ed.), p. 47.

[*WARRINGTON, J.*: It would follow, as I understand, that there might be contribution against the executors, though there would be no right of action against them by the third party.]

That right to contribution extends to costs as well as to damages: *Gerson v. Simpson* [1903] (3), and also to interest: *Hitchman v. Stewart* [1855] (4), approved in *In re Fox, Walker & Co., Ex parte Bishop* [1880] (5). Contribution between co-directors is analogous to the case of contribution between co-sureties.

(3) 10 Manson, 382; [1903] 2 K. B. 197, 202; 72 L. J. K. B. 603, 605; 89 L. T. 117; 51 W. R. 610.

(4) 3 Drew. 271; 24 L. J. Ch. 690; 3 Eq. R. 238; 1 Jur. (N.S.) 839; 3 W. R. 464.

(5) 15 Ch. D. 400, 421; 50 L. J. Ch. 18, 25; 43 L. T. 165; 29 W. R. 144.

[*Frankenburg v. Great Horseless Carriage Co.* [1899] (6), where the question was expressly left open whether the maxim *Actio personalis moritur cum persona* applies to the case of a deceased director who may have incurred liability under section 8 of the Directors' Liability Act, 1890, was also mentioned.]

Gatey, for Gillies, who settled with the plaintiffs during the course of the case, referred to *Thomson v. Clanmorris (Lord)* [1900] (7), *Richardson v. Willis* [1878] (8), and *Shepherd v. Hills* [1855] (9).

[*WARRINGTON*, J., mentioned *Cork and Bandon Railway v. Goode* [1858] (10).]

Gore-Browne, K.C., and *Frank Russell*, for Gaunt's executors:

The director whom these defendants represent died before the plaintiffs' liability under the Act was established. He died on 22 December, 1902, which was after judgment had been delivered by *BUCKLEY*, J., in *Broome v. Speak* (1), on 30 April, 1902, but before there had been any inquiries under the judgment. The liability under the Act is not established till there has been either an order on the inquiries or an agreement between the parties settling the amount to be paid. A claim under section 8 is the same as for fraud, and is barred if the defendant dies before judgment is completed by the damages being ascertained: *Phillips v. Homfray* [1883] (11). The plaintiffs have no right to contribution till their liability to pay compensation is established against them, and they have paid more than their share. "Has become liable" in section 5 means "has had his liability established": *Wolmershausen v. Gullick* [1893] (12). It would lead to a strange conclusion if, as the plaintiffs contend, the liability existed the moment the prospectus was issued or the shares allotted. There is no liability for contribution till the debt due from the plaintiffs is ascertained

(6) 7 *Manson*, 347; [1900] 1 *Q. B.* 504; 69 *L. J. Q. B.* 147; 81 *L. T.* 684.

(7) 8 *Manson*, 51; [1900] 1 *Ch.* 718; 69 *L. J. Ch.* 337; 82 *L. T.* 277; 48 *W. R.* 488.

(8) 1 *L. R. 8 Ex.* 69; 42 *L. J. Ex.* 15, 68; 12 *Cox, C. C.* 298; 27 *L. T.* 828.

(9) 11 *Ex.* 55; 25 *L. J. Ex.* 6.

(10) 13 *C. B.* 826; 22 *L. J. C. P.* 198; 17 *Jur.* 555; 1 *W. R.* 510.

(11) 24 *Ch. D.* 439; 52 *L. J. Ch.* 833; 49 *L. T.* 5; 32 *W. R.* 6.

(12) [1893] 2 *Ch.* 514; 62 *L. J. Ch.* 773; 63 *L. T.* 753; 3 *Rep.* 610.

and the claim against them is, in LINDLEY'S, L.J., phrase, "imminent": *Hughes Hallett v. Indian Mammoth Gold Mines Co.* [1882] (13). No action could have been brought against Gaunt in his lifetime. If the words "as in cases of contract" in section 5 create, as the plaintiffs say, a contractual relation, all the succeeding words would be unnecessary. "As in cases of contract" simply brings in the ordinary feature of contractual relation, namely, equality of contract. This is not a case of ordinary contract, but of statutory obligation, and the maxim *Actio personalis moritur cum persona* applies to all statutory contracts. The proposition is properly stated by saying, not that the maxim applies to torts, but that it applies to everything except contracts: *Finlay v. Chirney* [1888] (14). A claim against directors since the Directors' Liability Act, 1890, is as much a claim *ex delicto* as it was before: *Peek v. Gurney* [1873] (15), but since the Act the onus of proof is shifted: *McConnell v. Wright* [1908] (16). Although the Court is bound, upon the same facts as were before it in *Broome v. Speak* (1), to hold, as was there held, that there was a contract which ought to have been disclosed and was not, it is not bound, upon different facts in the present case, so to hold, and it may decide that it is not satisfied that a contract as alleged has been made out. The plaintiffs can only succeed if they show that they were liable to pay compensation by reason of an untrue statement in the prospectus. In order to succeed, the plaintiffs must show that the people to whom they have paid money could have recovered not only against them, but also against the present defendants. *Smith v. Chadwick* [1884] (17) is an authority, in an action of deceit, in the defendants' favour. The plaintiffs have not made out any damage sustained by reason of an untrue statement, so there is no cause of action: *Macleay v. Tait* [1905] (18).

(13) 22 Ch. D. 561; 52 L. J. Ch. 418; 48 L. T. 107; 31 W. R. 285.

(14) 20 Q. B. D. 494, 502; 57 L. J. Q. B. 247, 251; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324.

(15) L. R. 6 H. L. 377, 395; 43 L. J. Ch. 19, 36; 22 W. R. 29.

(16) 10 Manson, 160, 173; [1903] 1 Ch. 546, 558; 72 L. J. Ch. 347, 354; 88 L. T. 431; 51 W. R. 661.

(17) 9 App. Cas. 187; 53 L. J. Ch. 873; 46 L. T. 702; 30 W. R. 661.

(18) *Ante*, p. 24; [1906] A. C. 24; 75 L. J. Ch. 90; 94 L. T. 68; 54 W. R. 365; 22 T. L. R. 149.

But if these defendants are wrong in the above argument and are liable to contribute something, what are they to pay? The right to contribution being an equitable right, superimposed by equity, whether as to costs only or as to damages and costs, they are absolved from paying more than 15s. per share, which was agreed to be substituted for the legal liability. The liability under the Directors' Liability Act is only for damages. The liability to pay costs is entirely distinct from the Act; it is not a liability under that Act at all, but under the Judicature Acts, the rules and orders of the Court, and the inherent jurisdiction of the Court. These defendants are not liable in respect of costs: *Knight v. Hughes* [1828] (19). But, supposing they are liable in respect of the costs in the Court of first instance, at any rate they are not, in the absence of agreement, liable for the costs in the Court of Appeal or the House of Lords, and only for costs in the Court of first instance as between party and party: *Maxwell v. British Thomson Houston Co.* [1904] (20). If there is any liability, it is admitted it is in twelfths, subject to any credits which have to be given.

If the plaintiffs have any right to contribution, they have not adopted the proper course to enforce it; they should have proceeded by way of the third party procedure under Order 16, rule 48. A third party is in a very different position from a person against whom contribution is claimed, but who cannot defend himself as a third party can: a third party can say to the defendant, "Do not defend the action," or can take the burden of defence on himself and defeat the plaintiff.

Danckwerts, K.C., and A. R. Kirby, for Bray's executors:

The Court must be satisfied that upon the facts now before it, not upon those which were before the Court in *Broome v. Speak* (1) Broome was entitled to succeed against the defendants in that case. The plaintiffs must show, under section 3 of the Directors' Liability Act, loss or damage sustained by reason of an untrue statement. If the true statement had been made here, it would not have deterred

(19) 3 Car. & P. 467; M. & M. 247.

(20) [1904] 2 Q. B. 342; 73 L. J. Q. B. 644.

the intending shareholder, but rather would have induced him to take shares. The judgment in *Broome v. Speak* (1) cannot be taken as evidence of the facts against these defendants or as proof that that judgment was right against the defendants there (the plaintiffs here): *Gerson v. Simpson* (8); Taylor on Evidence (10th ed.), p. 1212.

[WARRINGTON, J.: I think, nevertheless, that the judgment in *Broome v. Speak* (1) establishes that Broome was entitled to succeed against the present plaintiffs. How far that carries them is another question.]

The whole effect of section 5 of the Directors' Liability Act was, to the extent mentioned in the section, to get rid of the rule in *Dering v. Winchelsea (Earl)* [1787] (21), that there was no contribution between joint tort-feasors. The right and duty of contribution is founded on doctrines of equity, and does not depend upon contract: *Stirling v. Forrester* [1821] (22); *Duncan, Fox & Co. v. North and South Wales Bank* [1880] (23); *Ward v. National Bank of New Zealand* [1888] (24); *In re Birmingham, Oxford, Reading, and Brighton Railway, Spottiswoode's Case* [1855] (25); and *Chillingworth v. Chambers* [1896] (26). The principle seems to be that a co-debtor is entitled to contribution when and not until he has paid more than his share: *Ramskill v. Edwards* [1885] (27), *Robinson v. Harkin* [1896] (28), and *Gardner v. Brooke* [1895] (29). That principle is embodied in section 5 of the Mercantile Law Amendment Act, 1856. In equity, as between these directors, there would have been no liability as regards Bray. The matter may be treated as if he were living. He stood out, and did not assent to the resolution to go to allotment. As against his executors, there is no evidence that the

(21) 1 Cox, 318; 2 Bos. & P. 270; 2 Wh. & Tu. L. C. (7th ed.), p. 535.

(22) 3 Bligh, 575, 590, 596.

(23) 6 App. Cas. 1, 19; 50 L. J. Ch. 355, 362; 43 L. T. 706; 29 W. R. 763.

(24) 8 App. Cas. 755, 765; 52 L. J. P. C. 65, 69; 49 L. T. 315.

(25) 6 De G. M. & G. 345.

(26) [1896] 1 Ch. 685, 701; 65 L. J. Ch. 343, 347; 74 L. T. 34; 44 W. R. 388.

(27) 31 Ch. D. 100; 55 L. J. Ch. 81; 53 L. T. 949; 34 W. R. 96.

(28) [1896] 2 Ch. 415; 65 L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702.

(29) [1897] 2 Ir. R. 6.

plaintiffs were liable. The plaintiffs must show that an action against Bray could be continued against his executors: *Phillips v. Homfray* (11). These defendants adopt the arguments of Gaunt's executors on *Actio personalis moritur cum personā*.

[*WARRINGTON, J.*: Bray not having died until this action was pending, his executors are in a less favourable position than the executors of Gaunt, who died before the inquiries in *Broome v. Speak* (1).]

The plaintiffs ought to have proceeded under Order 16, rule 48. Section 5 of the Directors' Liability Act was passed with the knowledge that the third party rules existed, and that they, and not the roundabout method which the plaintiffs have adopted, were the proper procedure.

These defendants are not liable for costs: *Potter v. London County Council* [1905] (30). *In re Fox, Walker & Co., Ex parte Bishop* (5), went on the assumption that there was an implied contract of indemnity. The present case does not go on any implied contract. The plaintiffs' position is that they are enforcing the right of Broome. The only thing these defendants could be sued for would be the compensation for loss under section 3 of the Directors' Liability Act.

Astbury, K.C., in reply:

The plaintiffs' claim against Gillies has now been got rid of by settlement. Judgment is asked *pro forma* against Clayton and Oswald, though it is admitted they are insolvent and do not appear.

[*WARRINGTON, J.*: I relieve the plaintiffs from the necessity of answering the suggestion that, so far as the defendants in *Broome v. Speak* (1) are concerned, those defendants are not liable. The defendants here are not in a position to deny that. But it may be that any difficulty the plaintiffs are now in is the result of their not having followed the third party procedure.]

The defendants say the plaintiffs have not, in fact, proved a contract entered into by the company the omission of which made the prospectus untrue. That is a question of law which has been decided by the House of Lords in *Broome v. Speak* (1).

[WARRINGTON, J.: The question, surely, on this point is whether, if an action had been brought against Bray and Gaunt on the facts before me, there would have been a judgment, the same as in *Broome v. Speak* (1).]

The legal result is that BUCKLEY, J., found there was a contract by the company, which the plaintiffs have proved here as it was proved there. The defendants also say that the plaintiffs have not proved that Broome and others as a class sustained damage by reason of the statement that the contract did not exist, because, they say, the plaintiffs have not proved that Broome and the others would not have taken the shares if they had known the contract existed: *Macleay v. Tait* (18). A director has rendered himself liable, "become liable to make any payment" under the Act, so soon as he has issued the prospectus and allotted shares on the terms and on the faith of it. "Who, if sued separately," means "who, if sued by the shareholder who has made the person seeking contribution liable," not "who, if sued by the person entitled to compensation or along with him."

[WARRINGTON, J.: I relieve the plaintiffs from arguing the *Actio personalis moritur cum persona* point.]

Here the contract is one on which the Court will assume there is *prima facie* damage, though, if the Court should further infer that it was one which would not influence a man's mind, it would rebut the former inference. Here there is no materiality to make the principle of *Macleay v. Tait* (18) apply. There is no possible point which Bray could have raised which was not raised in *Broome v. Speak* (1). The defendants say that "liable to make any payment" means that the director is not liable till the amount is ascertained. The very fact that a third party notice may be issued shows that there is a present liability before the amount is ascertained.

[WARRINGTON, J.: It seems to me there was an obligation affecting Bray and Gaunt in their lifetime, and that obligation applies to their executors.]

The plaintiffs are entitled to contribution in respect of costs, as in a contract of indemnity: Rowlatt on Principal and Surety, p. 238; *Knight v. Hughes* (19), *Kemp v. Finden* [1844] (31), *Hammond & Co. v. Bussey* [1887] (32), and *Smith v. Compton* [1832] (33).

Cur. adv. vult.

May 31.

WARRINGTON, J., read the following judgment: The plaintiffs allege that they are persons who, by reason of their being directors of a company and of their having authorised the issue of its prospectus, have become liable to make certain payments under the provisions of the Directors' Liability Act, 1890, and they claim to be entitled to recover contribution from the estates of three deceased co-directors and from certain living co-directors, alleging that such co-directors are persons who, if sued separately, would have been liable to make the same payments. The plaintiffs' claim is based on section 5 of the Directors' Liability Act, 1890. The plaintiffs Shepheard and Speak and the defendant Clayton were the defendants in an action of *Broome v. Speak* (1), brought by a shareholder under section 38 of the Companies Act, 1867, and under section 3 of the Directors' Liability Act, 1890. The plaintiffs in that action recovered as against those persons under both statutes. The remaining plaintiffs in this section are co-directors with the plaintiffs Shepheard and Speak, and they and the plaintiffs Shepheard and Speak have either been sued by other shareholders, or have been threatened with actions by them, and have satisfied their claims or have contributed to payments made by others of the plaintiffs, including the payments made in *Broome v. Speak* (1). The several defendants are in this position. Bray was a director who joined in the issue of the prospectus. He has died since the commencement of the action—namely, in August, 1905—and the action is proceeding against his executors. Isaac Gaunt, another director who joined in the issue of the prospectus, died in December, 1902, and the defendants Simpson, Butler, and Wade are his executors. The defendants McConnell, Mack, and Gillies have settled with the plaintiffs. The defendant Violet Emma Oswald

(31) 12 M. & W. 421; 13 L. J. Ex. 137; 8 Jur. 65.

(32) 20 Q. B. D. 79; 57 L. J. Q. B. 58.

(33) 3 B. & Ad. 407; 1 L. J. K. B. 146.

is the executrix of a deceased director whose estate is insolvent, and the defendant Clayton has contributed 1,000*l.*, and is now insolvent. The last two have not defended the action, which comes on against them upon motion for judgment.

Substantially, the question is whether the estates of Bray and Gaunt respectively, or either of them, are, or is, liable to make the contribution claimed. There is a serious question of law raised by the executors of Bray and Gaunt respectively, as to whether the cause of action, if any, against Bray and Gaunt ceased with their deaths. For the sake of simplicity, I will for the present deal with the case as if they were alive and were defendants to the action. What, then, are the questions I have to decide ? They seem to me to be, first, whether the plaintiffs have become liable to make any payments under the provisions of the Act, and, secondly, whether Bray and Gaunt would, if sued separately, have been liable to make the same payments. It is admitted that in *Broome v. Speak* (1) it was found that the prospectus contained an untrue statement, and further that the plaintiff in that action was entitled to the relief granted to him as against the defendants to that action. As I have already stated, relief was granted to him under the Act in question. This amounts, in my opinion, to an admission that the plaintiffs Speak and Shepheard and the defendant Clayton have become liable to make a payment by way of compensation under the provisions of the Act, namely, the payment of 15*s.* per share which was agreed to in the course of an inquiry directed in that action. This admission, however, goes only a little way, inasmuch as the contribution claimed is not confined to the liability in *Broome v. Speak* (1). I think the questions I have mentioned really resolve themselves into one, namely, whether, upon the facts proved or admitted in this action, an aggrieved shareholder would have been entitled to succeed against all the directors, including Bray and Gaunt.

I find the facts so proved or admitted to be as follows : The name of the company is the London and Northern Bank, Limited. The plaintiffs and Bray and Gaunt and the defendants MacConnell, Mack, Gillies, and Clayton, with one Oswald, deceased, were directors of the company, and joined in the issue of the prospectus in question, which contained a statement that the only contracts to which the company were parties were two, namely, one of 9 May,

1898, and one of 26 September, 1898. The aggrieved shareholder or supposed plaintiff applied for shares on the faith of the prospectus, and was allotted a certain number of shares accordingly. He alleges that there was in fact at least one other contract to which the company was a party, and that the above-mentioned statement is untrue. It is admitted by Bray (paragraph 4 of his defence) that one Bowden was the promoter of the company, and by the executors of Gaunt (in paragraph 7 of their defence) that the commission to which I shall hereafter refer was payable to the promoter. As I shall shortly explain, I find that this commission was payable to Bowden. As against Bray and Gaunt, therefore, I find that Bowden was the promoter. On 21 September, 1898, a letter was written by one Haddock, describing himself as trustee for the company, to one Craig in the following terms. The letter is headed "The London and Northern Bank, Limited." "Dear Sir,—In consideration of your advancing me the sum of 14,250*l.* to enable me to pay the same to the Leeds Joint Stock Bank, Limited, as a deposit on the purchase of their undertaking and assets, and your taking the risk of forfeiture, I hereby agree to repay the same on directors going to allotment or on the 30th October next, together with 7,500*l.* bonus for such loan.—Yours faithfully, J. D. Haddock, trustee for the London and Northern Bank, Limited." The purchase referred to in this letter was a purchase by the company, as appears by a minute of the directors dated 7 September, 1898. The deposit therefore was a deposit to be paid on a purchase by the company. On 27 September, 1898, a meeting of the directors was held, at which the following resolutions were passed: "Resolved that the agreement dated the 26th September, 1898, for the purchase of the Leeds Joint Stock Bank, Limited, and made between the said Leeds Joint Stock Bank, Limited, of the one part, and John Daniel Haddock as trustee for this company, of the other part"—that is, the person who signed the letter of 21 September—"be read and adopted on behalf of the London and Northern Bank, Limited, and the seal affixed thereto, it being understood that the bank incur no liability under such agreement either to complete the purchase or to find the deposit therein referred to, such deposit having been found by Mr. Craig at his own risk. The commission note given by Mr. Haddock to Mr. Craig in consideration of the latter finding the deposit and risking

the same in connection with the purchase of the Leeds Joint Stock Bank, agreeing to pay a commission of 7,500*l.* on the purchase of the Leeds Joint Stock Bank, Limited, was produced and read, it being arranged that the adoption of the said commission note should be recommended for confirmation at the next meeting of the board, when a fuller attendance of the directors might be present." Those resolutions show two things: first, that a deposit was admitted by the company to have been found by Mr. Craig at his own risk; and secondly, that the commission of 7,500*l.* was in respect of this transaction. The matter came again before the board on 1 October, when the following resolution was passed: "The subject of the commission note to Mr. E. Craig was considered. It was resolved that, in consequence of Mr. Craig having found the deposit at his own risk, the board agrees to repay the same with a bonus of 7,500*l.* if the directors go to allotment and when the purchase is completed," and then another resolution, "That the written consent of all the directors to the prospectus be deposited in the hands of the solicitors to the company." The executors of Gaunt admit in their defence that this resolution amounted to an agreement by the company to pay the commission to the promoter, whom I find to be Bowden. Bray, however, makes no such admission, and is entitled to insist, as he does, that the resolution departs from the terms of the letter of 21 September, and is therefore, in reality, a fresh proposal only on the part of the company, and that so far there is no agreement. On the same 1 October Haddock, in the name of the temporary secretary of the company, wrote the following letter to Craig: "Dear Sir,—I am instructed to acknowledge receipt of your letter of the 21st ultimo, which I placed before my directors at their meeting to-day, and to say that, in consequence of your having introduced the business and carried through the negotiations and found the deposit in connection with the purchase of the Leeds Joint Stock Bank, Limited, my directors agree to pay you the same together with a bonus of 7,500*l.*" This letter, of course, went beyond the authority given by the resolution. On 10 October, 1898, however, at a meeting of directors the following resolution was passed: "After full discussion and hearing the views of the directors of the Leeds Joint Stock Bank, Limited, and upon the chairman giving

Mr. Bowden an assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank, Limited, and raising the necessary deposit, shall be honourably met at a future meeting of the directors of the London and Northern Bank, Limited, it is resolved, with the assent of Mr. Craig, that the contract contained in the letter of the 21st September, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board." The prospectus, as altered, was submitted and provisionally approved. I infer from the reference to Bowden in the resolution that he was present. On 18 October Craig wrote to Haddock the following letter : " Dear Sir,—Referring to the letter which you wrote to me dated the 21st September, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank, Limited, or for raising the necessary deposit, shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled, and the arrangement there suggested being considered at an end." The minutes of 10 October were read and confirmed at a meeting of the directors held on 20 October. Messrs. Bray and Gaunt were appointed directors at this meeting, their appointment being the first business after the confirmation of the minutes of the previous meeting. Messrs. Bray and Gaunt are entered as present, and at this meeting the prospectus was read and considered again, and it was resolved that as altered the same be adopted as the prospectus of the company, and that it be issued to the public forthwith. It bears date 20 October. One of the alterations was the omission of all mention of the letter of 21 September, 1898, no doubt in consequence of what had taken place, and I think the inference is irresistible that Messrs. Bray and Gaunt either were present when the resolution of 10 October was read or were informed by their co-directors of that resolution and of the letter of 18 October. The resolution of 10 October, in my opinion, shows that the commission referred to in the letter of 21 September was, in fact, payable to Bowden, the promoter, and that Craig was merely acting on his behalf; and I find, as the result of the facts I have stated, that on

10 October, 1898, a verbal contract was made between the company of the one part and Bowden of the other part that, in consideration of the cancellation of that which the company acknowledges to be a contract contained in the letter of 21 September, 1898, the company would pay to Bowden a fair *quantum meruit* for his commission in finding the deposit. Bowden's part of this contract was performed by the letter of 18 October.

In my opinion there was, at the date of the prospectus, a contract to which the company was a party in addition to the two referred to in the prospectus; and the statement therein that those were the only two contracts was untrue. I have carefully avoided placing any reliance on any statement of fact found in the report of *Broome v. Speak* (1), but I consider that I am entitled to treat that case as an authority for holding that, on the facts as I find them to be proved or admitted in this case, there is in law a contract to which the company was a party. I refer particularly to a passage in the judgment of Mr. Justice BUCKLEY (34), and to one in the judgment of the MASTER OF THE ROLLS (35). The prospectus therefore contained an untrue statement.

It remains to consider whether upon the evidence before me the supposed plaintiff has suffered loss or damage by reason of such untrue statement. It is admitted that he applied for his shares on the faith of the prospectus; but it is said that this is not sufficient, and that he must further prove that if he had known the truth he would not have applied for his shares. In support of this proposition *Macleay v. Tait* (18) is relied upon. On the other hand, in *Broome v. Speak* (1), before Mr. Justice BUCKLEY and in the Court of Appeal, and in the same case in the House of Lords *sub nom. Shepheard v. Broome* (1), it was considered sufficient that the plaintiff had applied on the faith of the prospectus. Am I to hold that, if the present case were to come before the House of Lords, it would decline to follow its previous decision on the same facts in *Shepheard v. Broome* (1), or prefer its decision on different facts in *Macleay v. Tait* (18)? I cannot come to that conclusion. The matter is thus dealt with by Mr. Justice BUCKLEY. He says this: "Did the

(34) [1903] 1 Ch. at pp. 599, 600; 71 L. J. Ch. at pp. 720, 721.

(35) 10 Manson, at p. 45; [1903] 1 Ch. at pp. 615, 616; 72 L. J. Ch. at pp. 254, 255.

plaintiff rely upon the prospectus so that he can succeed by reason of the falsity of the statements? It is unintelligible to say that a person relied upon a fact which he was not told, or relied on his not being told a fact, and when you call a man after the event to say whether, if he had known a further particular fact, he would have done something or not, speaking for myself, it is so difficult to say exactly what a few years ago you would have done under different circumstances, that I should regard that evidence as of very little value. Be the man the most honest man possible, it is so easy to be wise after the event, that it is difficult for any man to say what he would have done under circumstances which did not arise. It is too much to expect of him that he should be able to say fairly what he would have done under those altered circumstances. The test, I think, to be applied is—it has been so stated by Lord HALSBURY, and was so stated in *Smith v. Chadwick* (17), and will be found in many cases—that if you find that the matter withheld is such as that if disclosed it reasonably would deter or tend to deter an ordinarily prudent investor from applying for the shares, then he is entitled to relief. As to that I will read only one passage from the evidence given by Sir Robert MacConnell. He, being called by the defendants, was asked: ‘Supposing you had been told that the promoter of this company, Bowden, had been promised a commission of 7,500*l.* for finding this deposit, and that the chairman of the company was going shares with him in it, would you have had anything to do with the concern?’—(A.) ‘I would have retired from the board forthwith.’—(Q.) ‘You would not have touched the thing?’—(A.) ‘Certainly not.’ I agree that that involves another element—namely, ‘that the chairman was going shares with him in it’; but, subject to that, Sir Robert MacConnell said that if he had known of this 7,500*l.* story he would not have touched it. Messrs. Bray and Gaunt, two directors of the Leeds Joint Stock Bank, who attended the meeting of 10 October, regarded this as a thing which was wholly wrong. Can I say that this plaintiff, if he had known it, would not have taken the view that Messrs. Bray and Gaunt took, or that Sir Robert MacConnell took? It appears to me I am entitled to say for the plaintiff, ‘This is a thing which it was very material to you to know; what you would have done I cannot tell; but here is a material thing which has not

been disclosed to you, and therefore you are entitled to relief.' " Now, in reference to this passage, I have not before me the evidence to which the learned Judge refers—and I wish to emphasise that—but I think I am justified in concluding from his reference to the nature of the contract, which is not disclosed, that the learned Judge would, without this evidence, have arrived at the same conclusion. The result in my opinion is this, that, consistently with *Macleay v. Tait* (18), the Court is at liberty to infer from the nature of the undisclosed fact that if an applicant for shares had known the truth he would not have applied. In *Macleay v. Tait* (18), when that case is examined, it will be found that the contract omitted was of such a nature that nobody could suppose that it would in the least, if a shareholder had known of it, have deterred him from applying. The inference I have mentioned I am prepared to draw in the present case. It seems to me that if the supposed plaintiff had known that the company to which he was asked to subscribe was under a liability to pay its promoter a commission, the amount of which was unascertained and might prove very considerable, such fact would have had a deterrent effect upon his mind. The result is, therefore, that the plaintiffs have become liable to make payments under the provisions of the Act, and Bray and Gaunt would, if living, be liable to make the same payments, and the plaintiffs would be entitled to contribution.

But it is said that, whatever cause of action the plaintiffs may have had against Bray and Gaunt, there is none against their executors. They say, and say rightly, that they (the executors) are not persons who, if sued separately, would have been liable to make the payment in question, because the act on which the supposed plaintiff would rely is a tort committed by the testator, and *actio personalis moritur cum persona*. Now, the section provides that a person who has become liable shall be entitled to recover contribution "as in cases of contract" from any other person who, if sued separately, would have been liable. Now, in cases of contract the right to recover contribution arises (except in cases of express stipulation), not from any notion of implied contract, but as an equitable right springing from the relations of the parties as persons liable for the same debt. The right, in my opinion, exists from the commencement of those relations, though there may be no

means of asserting it by action until one of the parties has met the common obligation, or more than his due proportion thereof, or is, at all events, in imminent danger of being compelled to meet it. See *Wolmershausen v. Gullick* (12) and the cases there cited. Apply this to the words of the statute in the present case. "As in cases of contract" must mean as in cases such as I have referred to, where the right of contribution arises from certain contractual relations. The statute tells you, in effect, that you are to treat the liabilities of the several directors to a shareholder as for this purpose contractual liabilities and their relations to him as contractual relations. See *Gerson v. Simpson* (3) and the judgment of the LORD CHANCELLOR there. It follows that, if I am right in the views that I have expressed as to the right of contribution in cases of contract, such right in cases under the statute also exists from the commencement of the relations giving rise to the common obligation—namely, at the time when the shareholder incurs loss by reason of the untrue statement in the prospectus. The correlative obligation to make contribution is one which in cases of contract could be enforced against the executors of a deceased co-contractor, and in my judgment the statutory obligation can also be so enforced. The argument on the part of the defendants, the executors, founded on the maxim *Actio personalis moritur cum personâ*, therefore fails.

The next question is, what is the extent of the liability? There were fourteen directors; two are insolvent, the remaining twelve must therefore *prima facie* contribute equally. But of course due account must be taken of sums recovered from those who have not paid their full shares. As to the sums paid for compensation for loss or damage, it is admitted that 15*s.* per share is a reasonable sum, and therefore the defendants will be liable to contribute their share to such sums as have been paid under this head, not exceeding 15*s.* per share in cases where a shareholder has consented to accept this sum in satisfaction. If there are any cases in which a shareholder has been actually found to be entitled to a larger sum, the plaintiffs would be entitled to contribution to this. As regards the sum of 700*l.* paid to Broome for his extra costs, and the two sums of 500*l.* paid to the Joint Stock Association on the compromise of certain of the claims, it seems to me that they are not payments for which the plaintiffs have become liable under the provisions of the Act, and the

defendants therefore are not liable to contribute to them. So also as regards the plaintiffs' own costs of the previous action. I cannot see how the defendants can be made to contribute to them. But as to the costs of the plaintiff Broome of the action of *Broome v. Speak* (1), up to and including judgment, and the costs paid to the other claimants, I think these may fairly be said to be payments made under the provisions of the Act, inasmuch as it is only by action or by agreement that the amount of compensation can be ascertained, and the Legislature must, I think, be taken to have contemplated the costs paid to claimants as falling within the liability. As regards the costs in the Court of Appeal and the House of Lords, I do not see how, in the absence of a special contract, the defendants can be made liable to contribute to them, and on the evidence I find that there was no such contract.

There are certain special defences requiring notice. Reliance is placed on correspondence and interviews of January, 1902, as amounting to an acceptance by the plaintiffs of the assistance offered by Messrs. Bray and Gaunt in the defence of *Broome v. Speak* (1), as being in satisfaction of their claims under the Act. The Act is never mentioned, and the conclusion I have come to is that the assistance given by Messrs. Bray and Gaunt was treated as nothing more than their contribution to the efforts of the defendants in *Broome v. Speak* (1) to defeat Broome's claim for the common benefit. Then Bray says he did not assent to the resolution to go to allotment, and therefore he ought to be excused. I can find no ground for this in the Act. He would, notwithstanding that fact, have been liable to an aggrieved shareholder; therefore he is liable to the plaintiffs. Then it was said that Speak, at any rate, cannot recover, because he settled separately in *Broome v. Speak* (1), and his payment did not free the others. This may be true when the payment was originally made, but such payment has since been included in the 15s. per share, and has thus contributed to the satisfaction of the claimants' demands, and I think, therefore, Speak is now in the same position as the others. As to the special defence raised by paragraph 7 of the defence of Gaunt's executors, I have heard no evidence in support of it, and cannot therefore give any effect to it. With regard to interest, I cannot find—though I am willing to be convinced to the contrary, if I can be—it was not argued at the hearing—any claim to interest by way of damages,

and I do not see my way at present to give any interest. The plaintiffs are entitled as against the executors of Oswald and the defendant Clayton to the same relief as against the estates of Bray and Gaunt, for what it may be worth.

[His Lordship, after discussion, held the plaintiffs to be entitled to interest at 4 per cent. on the sums which each defendant was liable to pay to the plaintiffs as from the date at which such sums ought to have been paid.]

July 17.

The case came before the Court again upon the form of the minutes. It was suggested that the plaintiffs might have received from certain of the defendants with whom they had settled more than they would have been entitled to receive under the judgment; and, if that were so, the other defendants ought to have the benefit of it. On the other hand, it was contended, on the authority of *Ashurst v. Mason* [1875] (36), that if, which was not admitted, the plaintiffs had received more, it was no concern of the other defendants, who were liable for their full proportionate contribution. His Lordship, however, thought the other defendants were entitled to the benefit of any excess which the plaintiffs might have received, and to have their proportionate liability to that extent diminished. He approved minutes of an order in the following form: "This Court doth declare that the plaintiffs respectively are entitled to contribution from the estates of George Bray, Isaac Gaunt, and William Walter Oswald, in the statement of claim mentioned respectively, to the payments made by them respectively in respect of the following matters—namely, first, compensation to persons who subscribed for shares on the faith of the prospectus mentioned in the first paragraph of the statement of claim, the amount of such compensation not to exceed 15s. per share, but this is not to extend to any moneys paid into Court in actions which are still pending. Secondly, the costs of the plaintiff in the action of *Broome v. Speak* (1), in the pleadings mentioned up to and including judgment, as well as his costs of the inquiry directed by such

(36) L. R. 20 Eq. 225; 44 L. J. Ch. 337; 23 W. R. 506.

judgment and the reference to Mr. Chadwyck Healey, K.C., and Edwin Guthrie, C.A. Thirdly, costs paid to other persons who applied for shares as aforesaid, whether under judgment in actions brought by them respectively or under agreement together with interest on the amounts that such estates are respectively liable to contribute as aforesaid at the rate of 4 per cent. per annum as from the dates when the payments in respect of which the estates are so liable to make contribution were made by the plaintiffs respectively. And it is ordered that the following inquiries be made, namely, First, an inquiry what sums have been paid by the plaintiffs respectively in respect of the several matters aforesaid. Secondly, an inquiry how much is due from the estates of the said George Bray and the said Isaac Gaunt respectively to each of the plaintiffs for principal and interest, having regard to the number of other persons liable to make the same payments and to the insolvency of the estate of the said William Walter Oswald and of the estate of the defendant Charles Darley Clayton (since deceased) and all sums if any received from such last mentioned estates or either of them or from the defendants Sir R. J. MacConnell Hugh Mack and W. D. Gillies or any of them. And the parties are to be at liberty to apply for payment of the sums found due, and in case the executors of the said George Bray do not admit assets then let an account be taken of the personal estate of the said George Bray come to the hands of the defendants James W. Close, David Grimshaw, John Willian Bray and Arthur Bray or any of them or of any other persons or persons by the order or for the use of the said defendants or any of them. And if the executors of the said Isaac Gaunt do not admit assets then let an account be taken of the personal estate of the said Isaac Gaunt come to the hands of the defendants Edward Overend Simpson Samuel Butler and John William Wade or any of them or of any other person or persons by the order of the said defendants or any of them. And it is ordered that James William Close David Grimshaw John William Bray and Arthur Bray as executors of George Bray the defendants Edward Overend Simpson Samuel Butler and John William Wade as executors of the said Isaac Gaunt and the defendant Violet Emma Oswald as executrix of the said William Walter Oswald pay to the plaintiffs their costs of this action up to and including

judgment such costs to be taxed by the Taxing Master. And this Court doth reserve all costs subsequent to judgment."

Solicitors: *Waterhouse & Co.*, for Plaintiffs.

Parker, Garrett, Holman & Howden, for Gillies.

Helder, Roberts & Co., agents for Simpson, Thomas & Co., Leeds, for Bray's and Gaunt's executors.

IN RE OTTO ELECTRICAL MANUFACTURING CO.
(1905), JENKINS' CLAIM.

1906, July 8. BUCKLEY, J.

Company—Date when Entitled to Commence Business—Contracts Previous to that Date—Contracts Provisional only—Contracts for Preliminary Expenses—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 6, sub-s. 1 and 3.

The word "provisional" in sub-section 3 of section 6 of the Companies Act, 1900, means that the contracts made by a company before the date at which it is entitled to commence business are to be read as if they contained a provision that they shall not be binding on the company unless and until it becomes entitled to commence business. It makes no difference whether a contract is preliminary or final or one in the course of carrying on the company's business; and if a company never becomes entitled to commence business no contract entered into by it is binding on it, and no one can sue it in respect of any such contract.

The company was registered on 26 May, 1905, as a company limited by shares, and issued a prospectus inviting the public to subscribe for its shares. Some of the shares were subscribed for in the memorandum of association, but none were paid up or allotted. The company had no registered office, and never became entitled to carry on business, but went into voluntary liquidation before the end of 1905. Certain expenses had been incurred in relation to the engagement of a secretary, the renting and furnishing of a temporary office, and the consulting of an expert concerning the value of certain patents; and Mr. A. C. M. Jenkins claimed that the company was indebted to him in sums paid by him at the request of the directors in regard to these matters. Mr. Jenkins claimed to have paid 240*l.* for furniture to be placed in the temporary office of the company.

This was a summons taken out in the winding-up by the liquidator to determine whether the claims ought to be allowed in view of section 6 of the Companies Act, 1900 (1).

Coldridge, for the claimant:

Sub-section 3 of section 6 is intended merely to prevent a company from entering into contracts relating to the carrying on of its business; it has no application to the preliminary expenses which a company must incur before it can enter on its business, and the company can enter into binding contracts in relation to these before it begins carrying on business.

There is a fundamental distinction between these preliminary expenses and the contracts and expenses into which a company enters while carrying on the business for which it is established—a distinction pointed out by KELLY, C.B., in *In re North Staffordshire Steel, Iron, and Coal Co., Ex parte Ward* [1868] (2). The interests of the public are protected by section 4, which prevents a company from dealing with allotment moneys till certain conditions have been complied with.

The provisions of section 6 must be read in connection with those of the Companies Act, 1862, section 17 of which directs a company to pay, among other things, the registration fee, and the company cannot pay this till it has obtained some money for the purpose.

[BUCKLEY, J.: That payment is not a matter of contract.]

(1) Companies Act, 1900, s. 6, sub-s. 1: "A company shall not commence any business or exercise any borrowing powers unless—(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and . . . (c) there has been filed with the registrar a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with."

Sub-section 3: "Any contract made

(2) L. R. 3 Ex. 180; 37 L. J. Ex. 83; 18 L. T. 445; 16 W. R. 763.

by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding."

Sub-section 6: "Nothing in this section shall apply to a company registered before the commencement of this Act."

Sub-section 7: "This section shall not apply to any company where there is no invitation to the public to subscribe for its shares."

There is another preliminary contract which is certainly binding—that of the signatories to the memorandum of association—Companies Act, 1862, s. 28, and *In re London, Hamburgh and Continental Exchange Bank, Evans's Case* [1867] (3).

It is no doubt difficult to give a general definition of preliminary expenses, but it is not so difficult to point to particular expenses—for instance, the hire of temporary offices, which must be of a preliminary character.

[He also referred to section 18 of the Companies Act, 1862, and section 26 of the Companies Act, 1900.]

A. F. Peterson, for the liquidator :

The words of sub-section 3 of section 6 are express, and quite unlimited. It provides that no contract shall be binding until the company begins to carry on business, and makes no exception in favour of preliminary contracts. No such exception, therefore, can be interpolated into the sub-section, and it has been admitted that "preliminary" is very difficult to define. The contract between a vendor and the company would seem to be "preliminary"; yet the sub-section must clearly apply to such a contract. The claims made in the present case are necessarily based on contracts entered into before they could be binding on the company, and the claims therefore fail.

Coldridge replied.

BUCKLEY, J.: The question for my determination is whether Mr. Jenkins, who claims to be a creditor of the company, can, having regard to section 6, sub-section 3 of the Companies Act, 1900, be heard to say that he is a creditor. Section 6 provides that "a company shall not commence any business"—not "its business," but "any business"—unless certain conditions are complied with. [His Lordship read sub-section 3, and continued:] The word "provisional" there means, in my opinion, this: that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business. Now this company never

(3) L. R. 2 Ch. 427; 36 L. J. Ch. 501; 16 L. T. 253; 15 W. R. 543.

did become entitled to commence business; therefore any contract made by the company was provisional and not binding on the company.

But counsel for the claimant has argued that the Act does not mean what it says: that it does not mean any contract, but any contract of a certain kind; and his next difficulty is to define of what kind. He says that it means any contract entered into for the purpose of carrying on its business, and that there are some contracts which are not entered into for the purpose of carrying on the business, but which are what he calls "preliminary"—for expenses incurred with a view to the future carrying on of business. In my opinion that argument is unsound. A company of this kind has no purpose of existence other than the carrying on of its business; every contract which it enters into must be for the purpose of carrying on its business in some form or other; whether it is preliminary or final, or one in the course of carrying on its business makes no difference. All its contracts must be with relation to its business; and I repeat that the language of the section is that "the company shall not commence any business" until certain conditions have been complied with. We are all familiar with the fact that under a previous system of legislation there was what was known as "provisional registration" and "complete registration" (7 & 8 Vict. c. 110). I think this subsection is intended as a return to some extent to the provisions which were contemplated by that system of legislation. The intention here is that if the company never becomes entitled to commence business nobody shall be able to sue the company in contract; the contract must be one which impliedly contains a provision that unless and until the company is entitled to commence business the company is not bound.

Those being the general questions, the exact facts here are these: The claimant, Mr. Jenkins, to take one instance, went to a furniture dealer, bought furniture, and had it put into an office which he took for the company. He says that he has paid the furniture dealer in respect of that the sum of 240*l.*, and he says, "I claim payment of that by the company." How does he claim? Obviously in contract. He claims upon this ground—that expressly or by implication the company promised to pay him for the furniture if

he would pay the furniture dealer for it. Of course, that is contract. The Act says that that contract is not binding on the company, and he cannot sue here. The other claims are for moneys which he advanced to a man to come up to town when he was going to serve the company, and other payments of a like kind. They are all claims in contract. In my judgment he cannot be heard to say that there was such a contract; the Act of Parliament forbids it.

I declare that, as the company was never entitled to commence business, no contract entered into by it is binding on the company, and that Mr. Jenkins's claim, which is the only one before me, must be disallowed.

Solicitors: *Lowndes and Son; G. T. B. S. Thurnell.*

IN RE JACKSON AND BASSFORD, LIMITED.

1906, July 17. BUCKLEY, J.

Company—Winding-up—Fraudulent Preference—Unregistered Agreement to Give Security when Called upon—Security Given on Eve of Winding-up—Companies Act, 1862.(25 & 26 Vict. c. 89), s. 164—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.

W. J. was "permanent director" and the largest shareholder in a company registered in March, 1904. His son was one of the other two directors. The company had a large turnover in 1904 and 1905. In December, 1904, it applied to its bankers for an overdraft, which the bankers agreed to give on the terms that W. J. should guarantee it. He guaranteed an overdraft up to 2,500*l.*, on an agreement by the company to give him security by means of a debenture or other charge whenever he should call upon the company to do so. In February, 1905, he guaranteed an overdraft up to 4,000*l.* on a similar agreement. He was a large trade creditor of the company. In 1905 the company made a heavy trading loss. On 8 December, 1905, W. J. asked the company for the security, and on 15 December the company gave him a debenture for the then amount of the overdraft, charged on all its property. The debenture was duly registered under section 14 of the Companies Act, 1900, but neither of the agreements was registered. On 1 January, 1906, the company went into voluntary liquidation. On a summons taken out by the liquidator in the winding-up for a declaration that the debenture was invalid as a fraudulent preference within section 164 of the Companies Act, 1862:—

Held, that, in view of the constitution of the board of directors, W. J. could have had the debenture at any time; that the agreement to give it, although made for value, could not be allowed to have legal effect if its performance were postponed until the time within which the law as to fraudulent preference takes effect had arrived, and that the debenture was therefore a fraudulent preference, and invalid.

In re Ash, Ex parte Fisher (1), and *In re Barker, Ex parte Kilner* (2) applied.

THE company was registered in March, 1904, its objects being to acquire the machinery, stock, fixtures, and effects of Mr. William Jackson, a boot and shoe manufacturer at Leeds, and to carry on the business of boot and shoe manufacturers and leather merchants.

The subscribers to the memorandum of association were Mr. William Jackson, his wife, his son Arthur Jackson, and two other members of his family, and Mr. F. J. Bassford and his wife.

The company had a nominal capital of 5,000*l.* in 1*l.* shares, but

- (1) L. R. 7 Ch. 636; 41 L. J. Bk. 62; 26 L. T. 931; 20 W. R. 849.
 (2) 13 Ch. D. 245; 41 L. T. 520; 28 W. R. 269.

only 807 shares were in fact issued, 501 being held by William Jackson, 151 by Arthur Jackson, 151 by Mr. Bassford, and the remaining four by the other signatories to the memorandum. The directors were William and Arthur Jackson and Bassford. William Jackson was, under the provisions of the articles, to be entitled to retain his office for life, and was styled "permanent director." The business was for a time a satisfactory one. In 1904 the turnover was 12,513*l.* 4*s.* 11*d.*, and in 1905 20,708*l.* 4*s.* 4*d.* Further capital being required, William Jackson was requested to guarantee an overdraft with the company's bankers, which the bank required as a condition of allowing it, and on 7 December, 1904, he wrote a letter consenting to do so if the company would, whenever called upon, give him full and sufficient security over its assets by means of a debenture or other charge. On 8 December, 1904, a meeting of the board of directors was held. Bassford presided, and William Jackson was present. It was resolved on the proposition of Bassford, seconded by A. Jackson, that William Jackson should be empowered to arrange an overdraft for the company at its banker's, and to secure it by a deposit of securities or otherwise, his liability not to exceed 2,500*l.* at any time. It was further resolved that in consideration of his arranging such overdraft the company should, whenever called upon to do so, give him full and sufficient security over its assets by means of a debenture or other charge in respect of the amount for which he should render himself liable. He arranged the overdraft accordingly. At a further meeting of the directors held on 1 March, 1905, at which Bassford again presided, and W. Jackson was again present, it was resolved that W. Jackson be empowered to arrange for a further overdraft, and be requested to secure it with the bank, his liability not to exceed 4,000*l.* at any time; and that in consideration of his doing so the company should, whenever called upon by him, give him full and sufficient security over its assets by means of debentures or other charge. He had made it a condition of arranging the further overdraft that this undertaking should again be given. William Jackson sold goods to the company, and from time to time the company owed him large sums. During 1904 there was a loss on trading of over 200*l.*, and during 1905 a loss of 2,793*l.* On 8 December, 1905, W. Jackson wrote requesting that arrangements should immediately be made to

give him full and sufficient security in respect of the amount for which he was liable to the bank, and which he had secured by a deposit of title deeds of his own. At a meeting of the directors, on 8 December, at which W. Jackson was present, it was resolved that the solicitors of the company be instructed to prepare a debenture on the company's assets in his favour. On 15 December, 1905, the company gave him a debenture for the sum of 3,600*l.* (the amount then due to the bank), with interest at 6 per cent., charged on the undertaking and all the present and future property of the company. The debenture was duly registered on 21 December in pursuance of section 14 of the Companies Act, 1900 (3), but neither of the previous agreements to give security had been registered.

At an extraordinary general meeting held on 1 January, 1906, a resolution for the voluntary winding-up of the company was passed. This was a summons taken out by the liquidator in the winding-up for a declaration that the creation and issue of the debenture was an undue and fraudulent preference of W. Jackson over the other creditors of the company under section 164 of the Companies Act, 1862 (4), and that the debenture was invalid accordingly.

(3) Companies Act, 1900, s. 14, sub-s. 1: "Every mortgage or charge created by a company after the commencement of this Act and being either—(a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the company; or (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

(4) Companies Act, 1862, s. 164: "Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section . . . a resolution for winding up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader. . . ."

Buckmaster, K.C., and R. J. Parker, for the liquidator :

A bargain such as this is manifestly to the prejudice of the general creditors of the company, and is void. The giving of the debenture in the present case was purposely postponed until the company was insolvent to the knowledge of the debenture-holder, in order to prevent the danger to its credit which would have resulted from registration, in just the same way as was the giving of the bill of sale in *In re Ash, Ex parte Fisher* [1872] (1), and *In re Gibson, Ex parte Bolland* [1878] (5), in both of which cases the bill of sale was held to be void. For the security to be valid there must be an agreement to give it immediately : *In re Hemingway, Ex parte Hauxwell* [1889] (6). The onus is on the party who sets up a prior agreement of this kind to prove its *bona fides* : *In re Barker, Ex parte Kilner* [1879] (2), and in the present case the debenture-holder entirely fails to discharge that onus. There is, on the contrary, overwhelming evidence of an intention to defeat the general creditors.

Eve, K.C., and T. P. Perks, for the debenture-holder, William Jackson :

To hold that this transaction is fraudulent would be to hold that it is an illegal evasion of the law for a creditor to whom a security is offered to decline it at the time, but to say that a time may come when he will call for it. This is not illegal : *In re Softley, Ex parte Hodgkin* [1875] (7). The debenture is valid on the grounds on which the giving of the bill of sale in *In re King, Ex parte King* [1876] (8), was held not to be an act of bankruptcy—that it was given in pursuance of an agreement by which a substantial further advance was obtained.

[BUCKLEY, J.: That was merely a decision on the facts of the case.]

It was approved by the Privy Council in *Administrator-General of Jamaica v. Lascelles, De Mercado & Co.* [1894] (9). See also *Halliday*

(5) 8 Ch. D. 230; 38 L. T. 326; 26 W. R. 481.

(6) 23 Ch. D. 626; 52 L. J. Ch. 737; 48 L. T. 472; 31 W. R. 711.

(7) L. R. 20 Eq. 746; 44 L. J. Bk. 107; 33 L. T. 62; 24 W. R. 68.

(8) 2 Ch. D. 256; 45 L. J. Bk. 109; 34 L. T. 466; 24 W. R. 559.

(9) 1 Manson, 163; [1894] A. C. 135; 63 L. J. P. C. 70; 70 L. T. 179: 42 W. R. 416; 6 Rep. 445.

v. *Holgate* [1867] (10). In bankruptcy cases it is necessary to show an intention to prefer a particular creditor: *In re Wilcoxon, Ex parte Griffith* [1888] (11); and an assignment two days before bankruptcy was held good in *New, Prance, and Garrard's Trustee v. Hunting* [1897] (12), on the ground that no such intention existed. *Morris v. Morris* [1895] (13) is another authority to the same effect. Where a security is given in completion of a direct contract a length of time intervening between the various steps in the transaction does not make it a fraudulent preference if the creditor has not abandoned his demand: *In re Bent, Ex parte Mackenzie* [1873] (14). In *In re Ash, Ex parte Fisher* (1), the question was whether the transaction was an act of bankruptcy.

Buckmaster, K.C., in reply:

The principles laid down in *In re Ash, Ex parte Fisher* (1), and the other decisions to the same effect, are quite independent of the Bankruptcy Acts. They are equally applicable where there is no act of bankruptcy or insolvency—for instance, on a seizure by the sheriff. In the present case, at all events, there is evidence of an intention to prefer Mr. Jackson. He and the other directors knew the company to be insolvent.

BUCKLEY, J.: This company is in voluntary liquidation under an extraordinary resolution passed on 1 January, 1906. By the terms of the resolution the company declared itself insolvent; it is insolvent, moreover, in the sense that its assets are not sufficient for the payment of its creditors. There is a deficiency, I am told, of something like 2,500*l.* due to the creditors.

The application before me is a summons by the liquidator asking for a declaration that a certain debenture of the company, executed on 15 December, 1905—that is to say, little more than a fortnight before the winding-up commenced—was a fraudulent

(10) 17 L. T. 18.

(11) 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L. T. 450; 31 W. R. 878.

(12) 4 Manson, 103; [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 45 W. R. 577. On app., *sub nom. Sharp v. Jackson*, 6 Manson, 264; [1899] A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841.

(13) [1895] A. C. 625; 64 L. J. P. C. 136; 72 L. T. 879; 44 W. R. 65; 11 Rep. 554.

(14) 42 L. J. Bk. 25; 28 L. T. 486.

preference within section 164 of the Companies Act, 1862. The debenture-holder is one William Jackson, and the debenture is to secure the sum of 3,600*l.* The company was incorporated on 2 March, 1904, under the name of Jackson and Bassford, Limited, and its memorandum of association was signed by five Jacksons and two Bassfords, the two Bassfords being, I take it, Mr. Bassford and his wife, and the Jacksons being William Jackson, the respondent to the summons, his wife, and three of his children. By the articles of association three directors were appointed—the respondent William Jackson, Arthur Jackson his son, and Frederick James Bassford ; and William Jackson was to be what is called " permanent director." The capital of the company was in shares of 1*l.* each, and it issued 807 shares, and no more. These shares were held as to 501 by William Jackson, as to 151 by Bassford, and as to 151 by Arthur Jackson ; and four persons—namely, Mrs. Jackson, Mrs. Bassford, and the other two children of Mr. and Mrs. Jackson—held the remaining four shares. The substance of this, of course, is that William Jackson was not only a member of the board, but also the permanent director and the holder of the great bulk of the shares.

This company, with its small subscribed capital of 807*l.*, carried on business to such an extent that its turnover in 1904 was 12,518*l.*, and in 1905 was 20,708*l.* It is obvious that such transactions could not have been undertaken without money being obtained somehow. The way in which the money was got was this. The company had an account with the Bradford and District Bank, and the bank was willing to allow the company an overdraft upon the terms that William Jackson guaranteed the overdraft. The overdraft first arranged for was 2,500*l.* In December, 1904, William Jackson wrote a letter to the company saying that he was prepared to guarantee if he got security ; and on 8 December, 1904, at a board meeting at which William Jackson, Bassford, and Arthur Jackson were present, a resolution was passed that "in consideration of William Jackson arranging such overdraft as referred to in the resolution above the company should, whenever called upon by him to do so, give him full and sufficient security over its assets by means of debentures or other charge in respect of the amount for which he shall render himself liable." He thus obtained an overdraft from the bank up to 2,500*l.*, and the company drew upon its

account and exhausted that overdraft. In February, 1905, there was a proposal to enlarge the overdraft by 1,500*l.* more, up to the sum of 4,000*l.*; and another letter and resolution ensued, which I need not read, as in substance they are the same as the former letter and resolution. The result was that the bank allowed an overdraft for 4,000*l.*, and William Jackson deposited securities of his own with the bank by way of security for the overdraft, and obtained from the company the resolution that he should have security whenever he called for it. He undoubtedly gave value for the promise to give him security, he had to become guarantor and to give security to the bank. William Jackson himself was a leather merchant who sold goods to the company to a large extent. The company owed him large sums of money from time to time, and, as it had this overdraft at the bank, he benefited from the transaction in this way, that he received payment for the goods which he sold to the company. Matters went on until 8 December, 1905. On that day he wrote a letter calling for the security which the company had agreed to give him, and on the same day there was a board meeting, at which his letter demanding security was read, and it was resolved "that the solicitors to the company be and they are hereby instructed to prepare and submit for execution by the company a debenture on the company's assets in favour of Mr. William Jackson to secure the amount for which he was liable to the bank." On 15 December this debenture, which was for 3,600*l.*, was given. The question is whether William Jackson can hold that security.

In *In re Ash, Ex parte Fisher* (1), Lord Justice MELLISH says, in a passage which has often been quoted since : "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." By section 14 of the Companies Act, 1900, provision is made for the registration of mortgages and charges which are given by limited companies. The object of that

legislation is that those who are minded to deal with limited companies may be able, by searching a certain register, to find whether the company has incumbered its property or not. An agreement to give security may be either one of two things. It may be so expressed as to create a present equitable right to a security. If it does that, then it would seem to me that it must be registered under section 14 of the Act of 1900, otherwise it is void as against the liquidator and any creditors of the company. Or it may be so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created. In that latter case, if the agreement does not create a security, it will not require registration; but if an agreement of that kind were allowed to be employed for the purpose of excluding the doctrine of fraudulent preference, it is obvious that that would be a means of enabling the company, in point of fact, to create incumbrances upon its property which would not require registration, and being unregistered would never be open to the knowledge of its creditors, and which would be said to be outside considerations of fraudulent preference because they were given pursuant to an antecedent promise. Going back then to the judgment of Lord Justice MELLISH, I read the passage again: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale. . . ." If these words apply to this case, then the matter would require registration under section 14 of the Act of 1900. If that be not so, I will again read on to the words "general creditors" at the end of the passage. [His Lordship again read those words, and continued:] I think that is language which is applicable to exactly such a state of things as the present. If a creditor of a corporation takes a promise to give a security in the future, and holds it over so as not to injure the credit of his debtor in order to escape the necessity of registering under section 14 of the Act of 1900, and thus disclosing to the creditors the fact that there is an incumbrance, it seeme to me that that is evidence of an intention to commit an actual fraud upon the general creditors from whom that information is withheld. *In re Ash, Ex parte Fisher* (1), has been followed in several cases, as to which I need only say a word. In *In re Gibson, Ex parte Bolland* (5), before Chief Judge BACON, I do

not find any new principle. He was simply there determining questions of fact, and applying *In re Ash, Ex parte Fisher* (1), to the facts. The promise was to "give a bill of sale whenever you require it." The Chief Judge says, "It would be directly repugnant to all principles of bankruptcy law to say that if a man contracts a debt in 1879, and says to the lender, I will give you as security a bill of sale, if you like, and the lender says, I will not take it unless you are pressed, and the lender dies, and then the executor comes and says, I must have security for this debt, and the bill of sale is accordingly given, that is a valid bill of sale." He says you must "see if a just inference can be drawn from the facts that the intention was to give one of the creditors an advantage over the others by giving a bill of sale." He comes to the conclusion, as a matter of fact, that the lender says, "I will not take your bill of sale now, because I must register it, and if I register it your credit will be destroyed." *In re Barker, Ex parte Kilner* (2), emphasises the rule laid down in *In re Ash, Ex parte Fisher* (1), and decides this—that an agreement to give security if and when required does not necessarily leave the person who takes the security open to have it impeached as a fraudulent preference, but that the onus is on him to prove that he postponed taking it for some valid reason—valid for his own purposes—and that it was not postponed in order to protect the grantor's credit, or, in other words, to enable him to obtain credit from other people in ignorance that he had given a promise which he might be called upon to perform. In *In re Hemingway, Ex parte Hauxwell* (6), the bill of sale was upheld because the Court found that there was an agreement for immediate execution of the bill of sale, and that the lender tried to get it, and did not abstain from getting it in order to bolster up the debtor's credit.

That being the law which I have to apply, the facts here are these: The board of this company was so constituted as to leave no room for doubt that William Jackson could have had his debenture at any moment if he chose to ask for it. He, his friend Bassford, and his son were the three directors. Directly he asked for the debenture he got it. How does he discharge himself of the onus which, according to *In re Barker, Ex parte Kilner* (2), rests upon him of proving that the postponement to take a debenture was *bonâ fide*? It seems to me that he does not discharge it at all. It seems

to me that the facts point to this—that, relying upon the possession of an agreement undisclosed, and of course unregistered under section 14 of the Act of 1900, to give a security, he went on incurring debts on behalf of the company, relying on the fact that he could, at some subsequent time when it suited him, on the eve of the insolvency, come in and say, "Now I call upon you to give effect to your antecedent promise and to give me the security for the debt which you incurred to me long ago." To allow this would be to make section 14 of the Act of 1900 a dead letter. If such a doctrine were to be upheld, it would only be necessary for parties to hold undisclosed agreements to give security in the future; the creditors would never know of these, and the creditor could come down at the last moment on the eve of insolvency, and ask for and obtain the security. I do not think the Act of Parliament allows it. It seems to me here that the promise which certainly was made—for value I agree—was a promise to which effect could not legally be given by postponing the performance of that promise until the execution of such an instrument, which would but for the promise be a fraudulent preference.

I think here that the debenture was a fraudulent preference, and must be treated accordingly.

Solicitors: *Burton, Yeates & Hart*, agents for *Tyrer, Kenion, Tyrer & Simpson*, Liverpool; *Vincent & Vincent*, agents for *Peckover & Scriven*, Leeds.

SMITH *v.* PARINGA MINES, LIMITED; PARINGA
MINES, LIMITED *v.* BLAIR; PARINGA MINES,
LIMITED *v.* BOYLE.

1906, April 11. KEKEWICH, J.

Company—Directors—Election—Powers—Postponement of General Meeting.

In the absence of express power in the articles of association, directors have no power to postpone a general meeting of shareholders which has been properly convened. The fact that the directors have power to fix the time and place of the meeting and to adjourn the meeting does not give them the power.

A director may be appointed in an informal manner, provided the requirements of the articles of association are complied with. A director need not therefore be appointed at the offices of the company.

MOTION.

The Paringa Mines, Limited, was incorporated under the Companies Acts on 17 April, 1902. In February, 1906, there were only two directors of the company—Mr. Blair, chairman, and Mr. Tilden Smith. Blair proposed to Tilden Smith that Mr. H. C. Foulkes should be appointed a third director to fill up a casual vacancy which had occurred on the board, and on 18 February Tilden Smith received a notice calling a board meeting for 21 February at the company's offices. Tilden Smith did not attend the board meeting, but telephoned that he would see Blair at his (Smith's) office. Blair accordingly went there, and saw Tilden Smith outside the door of his private room. He explained that he had nominated Foulkes as director, and asked him if he objected. Tilden Smith said that he did, and Blair replied that by his casting vote he declared Foulkes duly elected, and the board meeting closed. The records were duly entered up and signed by Blair as chairman.

On 28 March, 1906, Tilden Smith received notice calling the annual ordinary meeting of shareholders for 5 April, 1906, for the purposes of receiving the annual report and of electing directors. On the same day Tilden Smith, on behalf of himself and all the other shareholders, commenced an action against the company, Blair, and Foulkes for a declaration that the appointment of Foulkes as director was illegal, and an injunction to restrain him from acting, and served notice of motion on the defendants in the terms of the writ. On 4 April, 1906, Tilden Smith received a notice

postponing the meeting called for 5 April, which notice purported to be by order of the board, and was signed by F. Stobbs, the secretary. On the same day (4 April) Tilden Smith wrote to the secretary that the postponement was illegal and that the meeting would be held. The meeting was held and unanimously passed resolutions re-electing Tilden Smith as a director, rejecting Foulkes as a director, and electing Boyle and Parker as directors.

On 6 April a board meeting was held and attended by Smith, Boyle, and Parker. At this meeting C. S. Beale was appointed secretary *pro tem.*, and the late secretary was requested to hand over the books, papers, and seal of the company, but he declined to do so.

The articles of association contained no provision for the postponement of a general meeting, but they empowered the directors to fix the time and place of general meetings, and empowered the chairman to adjourn the same. The articles also provided that, until otherwise provided by a general meeting, the number of directors should be not less than three or more than five. They also provided for the retirement of directors by rotation, and empowered the company at the ordinary general meeting to fill up vacancies, and provided that any person filling a casual vacancy should retain office so long only as the vacating director would have retained the same.

On 6 April the company, Smith, Boyle, and Parker commenced an action against Blair, Foulkes, and Stobbs, and moved for an injunction requiring the defendants to deliver over to the plaintiff directors, or to Beale, the books, papers, and seal of the company.

On 7 April the company commenced an action against Boyle, Parker, Smith, and Beale, and moved for an injunction to restrain the defendants other than Smith from acting as directors and secretary, and to restrain Smith from aiding and abetting them in so acting. The three motions now came on for hearing together.

P. O. Lawrence, K.C., and Cozens-Hardy (Gore-Broune, K.C., with them), for the applicant in the first motion; and P. O. Lawrence, K.C., and Cozens-Hardy, for the applicant in the second motion:

We contend—first, that Foulkes was not properly appointed a director; and secondly, that the directors had no power to

postpone a general meeting which had been properly convened, and therefore that Boyle and Parker were properly elected directors of the company. The decision most nearly in point is *National Dwelling Society v. Sykes* [1894] (1).

A. F. Peterson, for the respondents in the first two motions:

If Foulkes was not properly elected the general meeting could not have been called, and everything that passed there was invalid. If he was properly elected, there was power to postpone. If directors have power to call meetings they must have power to postpone them. The articles provide that they are to determine the time and place of meetings, and that they may adjourn them. They can therefore postpone them. It is a common thing when an action is brought against a company for directors to undertake to postpone a meeting.

A. F. Peterson also appeared for the applicants in the third motion, and *Cozens-Hardy* for the respondents.

KEKEWICH, J.: It seems to me that Foulkes must be taken to have been duly elected director of the company. There was a vacancy on the board, and according to the evidence a board meeting was properly summoned for the purpose of filling up the vacancy. Tilden Smith did not attend. It was objected that Tilden Smith saw Blair in the passage outside his own office. But there is no reason why the meeting should not have been held in the passage. The two directors met there, and Blair proposed the election of Foulkes as director. Tilden Smith objected, and therefore the directors were equally divided, one against one. Blair, being in the chair, gave his casting vote in favour of Foulkes, and, so far as I can see, Foulkes was validly elected. That being so, it was competent for the board to convene a meeting of the shareholders, and a meeting was convened for a certain day. It matters not why, but Blair, not wishing the meeting to take place at the time and place at which it was convened, purported to postpone it

(1) 1 Manson, 457; [1894] 3 Ch. 159; 63 L. J. Ch. 906; 4 W. R. 69;
8 Rep. 758.

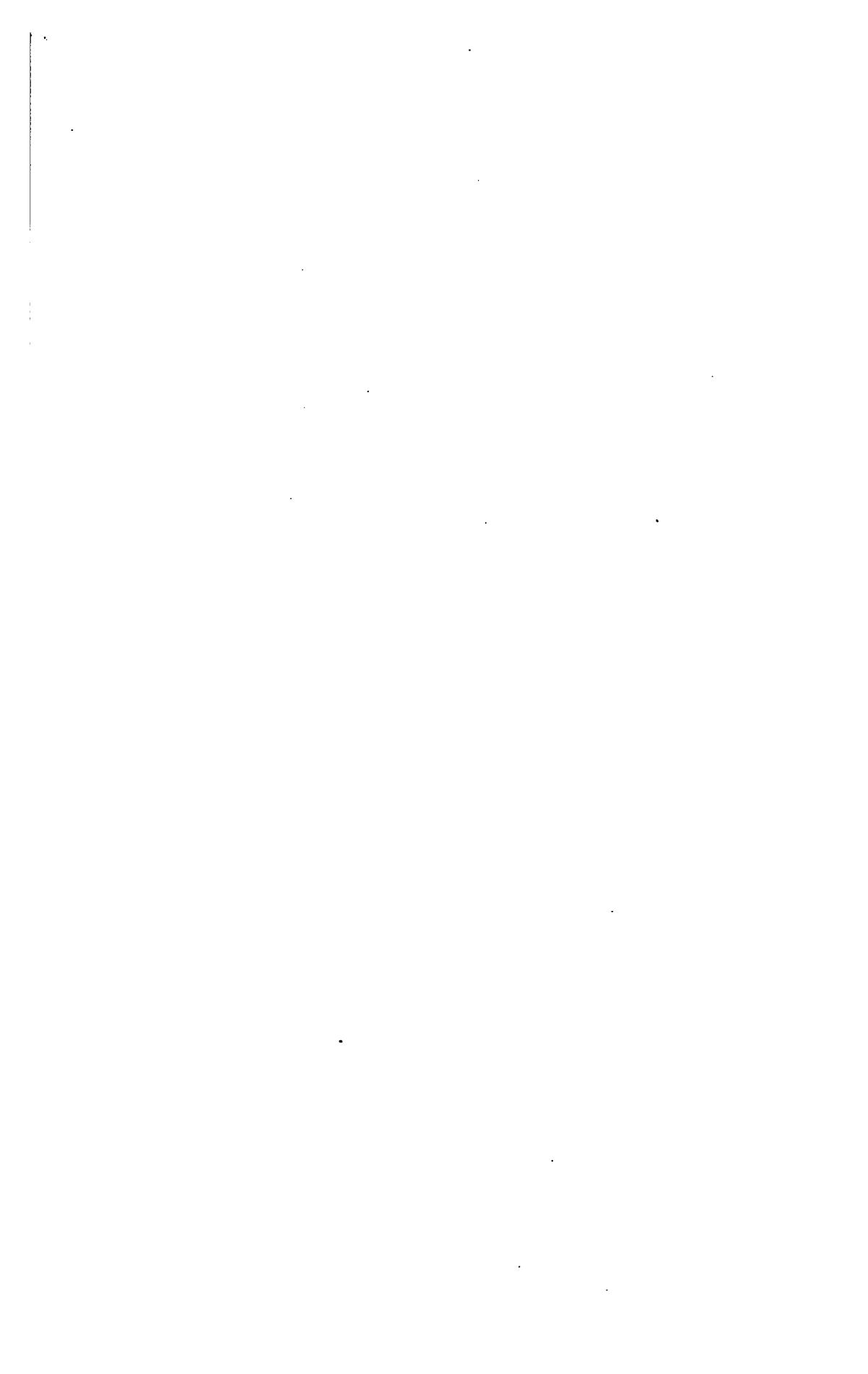
by a written notice expressed to be by order of the board and signed by the secretary. I will assume that the notice was duly issued by the authority of the board and was given at the proper time and to every shareholder. I entirely agree with the opinion given by counsel that it was not competent for the board to postpone the meeting. The articles of association provide for the adjournment of a general meeting in certain events, but they contain no provision for postponement.

It is said that the directors must be able to postpone the meeting because they may fix the time and place at which the meeting is to be held, and may adjourn the meeting; but, in my opinion, that is not so. On the other hand, if the directors had power to postpone, and a meeting adverse to the directors was called, they might postpone it for a week, or a month, or perhaps *sine die*. I cannot see that there is any doubt upon the point.

The real question is as to the election of directors. As to Tilden Smith, it is agreed that he was willing to stand, and was re-elected. As to Foulkes, he supplied a casual vacancy caused by the retirement of a director. Under the provision in the articles he only held office so long as the vacating director would have retained the same if no vacancy had occurred. He therefore retired at this meeting, and he was not re-elected. Somebody else was elected instead; so that from the date of the general meeting the board was properly constituted, the directors being Smith, Boyle, Parker, and Blair.

The officers of the company must do what the board directs them to do, and so long as the directors behave themselves properly the Court cannot interfere with them. There will be an order that the books, papers, and seal of the company be handed over to them.

Solicitors: *Vallance, Birkbeck & Barnard; Birkbeck, Moreton Thompson & Co.; Courtenay, Croome, Son & Finch.*



PONSFORD, BAKER & CO. v. UNION OF LONDON
AND SMITHS BANK.

1906, July 18, 16; August 9. C. A. VAUGHAN WILLIAMS, ROMER,
AND FLETCHER MOULTON, L.J.J.

Bankruptcy—Mortgage by Debtor—Act of Bankruptcy—Knowledge of Mortgagee—Redemption of Security—Relation back of Title of Trustee in Bankruptcy—Liability of Mortgagee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9, sub-s. 2; ss. 43, 49.

A secured creditor who has notice of an act of bankruptcy by his debtor within three months is not entitled before the expiration of that period to receive payment of the debt from his debtor, and consequently the debtor cannot make a good tender to the creditor and require him to give up his securities to the debtor on payment of the amount due.

Stockbrokers were in April, 1906, declared defaulters on the Stock Exchange, and an official assignee was appointed according to the rules of the Stock Exchange. They had deposited with the defendants certain securities to secure a loan. The official assignee tendered the amount due in respect of the loan and called on the defendants to hand over the securities. They refused on the ground that, having notice of an act of bankruptcy by the stockbrokers—namely, the assignment to the official assignee—within three months, they would not be safe in handing over the securities till the expiration of three months, for if bankruptcy proceedings were taken within that period the title of the trustee in bankruptcy would relate back. The stockbrokers and official assignee then sued for delivery up of the securities on payment of the amount due:—

Held, that the plaintiffs could not require the defendants to give up the securities.

Per CURIAM: If the official assignee were prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings were taken or the period of three months had expired, an order should be made empowering him so to do. If he were not, no immediate judgment should be given in the action, but it should be directed to stand over until it could be seen who was the person entitled to redeem.

In re Lawford and Lawrence, Ex parte Nichols (1), overruled.

APPEAL from decision of BUCKLEY, J.

The plaintiffs, Messrs. Ponsford, Baker & Co., who were stockbrokers, having become defaulters on the Stock Exchange on 27 April, 1906, made an assignment of all their assets to the official assignee of the Stock Exchange for the benefit of their creditors.

At the date of such default they had a loan account at interest with the defendants, the Union of London and Smiths Bank,

(1) 9 Manson, 254; [1902] 2 K. B. 445; 71 L. J. K. B. 786; 86 L. T. 693; 50 W. R. 592.

Limited, which was secured by certain securities lodged with that bank; and inasmuch as the debtors and the official assignee were of opinion that it was desirable in the interests of the estate to redeem those securities, they on 15 May, tendered to the bank the amount due by the debtors and called on the bank to hand over the securities. The bank, however, having notice of the assignment to the official assignee, refused to accept the tender of the money or to hand over the securities on the ground that they had notice of an act of bankruptcy, and having regard to sections 43 and 49 of the Bankruptcy Act, 1883 (2), would not be safe in handing over the property till the expiration of three months, for if bankruptcy proceedings were taken during that period the title of the trustee would relate back. Thereupon the debtors and the assignee, as joint plaintiffs, commenced this action against the bank, claiming the return of the securities and damages for their wrongful detention, or, in the alternative, judgment for the redemption of the securities.

(2) Bankruptcy Act, 1883, s. 43: "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

Section 49: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing

in this Act shall invalidate, in the case of a bankruptcy—

- (a) Any payment by the bankrupt to any of his creditors,
- (b) Any payment or delivery to the bankrupt,
- (c) Any conveyance or assignment by the bankrupt for valuable consideration,
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

Provided that both the following conditions are complied with, namely—

"(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

"(2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

On 25 May, 1906, an interlocutory motion in the action was made before BUCKLEY, J., for an order that on payment to the defendants of the sum due from the debtors to the bank the securities should be given up to the plaintiffs, and affidavits were filed bringing before the Court the facts of the case, which were not in any wise in dispute. By consent of the parties the motion was taken to be the hearing of the action, and the learned Judge, considering that the case was covered by *In re Lawford and Lawrence, Ex parte Nichols* [1902] (1), made an order in the terms of the motion, giving the plaintiffs the costs of the action and providing that the defendants should only be entitled to charge against the debtors interest down to the date of the tender of the money. He treated the refusal of the defendants to accept the tender of the money before action as wrongful.

The defendants appealed.

Warmington, K.C., and R. J. Parker, for the appellants:

When the stockbrokers made default and the official assignee of the Stock Exchange took possession of their assets, an act of bankruptcy was committed. The question is whether the bankers can in view of the doctrine of relation back be compelled to part with the money and the securities. That question depends upon whether the decision of WRIGHT, J., in *In re Lawford and Lawrence, Ex parte Nichols* (1), which BUCKLEY, J., followed, has affected the earlier cases.

The rules of the Stock Exchange with regard to defaulting members cannot affect the rights of the general creditors of such defaulting members: *Tomkins v. Saffery* [1877] (3). This case was argued in the Court below on the assumption that there had been an act of bankruptcy. If bankruptcy follows within three months of the act of bankruptcy the trustee's title has relation back to such act: see section 43 of the Bankruptcy Act, 1883.

The doctrine of relation back in bankruptcy goes back to the time of Queen Elizabeth. One of the earliest cases on the subject is the banker's case: *Vernon v. Hankey* [1787] (4). There a customer of the bank committed an act of bankruptcy and

(3) 3 App. Cas. 213; 47 L. J. Bk. 11; 37 L. T. 758; 26 W. R. 62.

(4) 2 Term Rep. 113.

subsequently deposited securities with the bank ; and the bank, after notice of the act of bankruptcy, honoured the customer's drafts, and they were held liable to pay the money over again to the assignee in bankruptcy. That case was not cited in the Court below.

Unless the transaction is protected by section 49 of the Bankruptcy Act, 1883 (2), any person who makes a payment or delivery of property to a person who has committed an act of bankruptcy does so at his own risk, and is liable to the true owner : *In re Pooley, Ex parte Rabbidge* [1878] (5).

In *In re Lawford and Lawrence* (1) WRIGHT, J., discussed *Vernon v. Hankey* (4), and drew a distinction between money and chattels. But there is nothing more peculiar in the contract of pledge than there is in the contract with the bank. Every bank undertakes to deliver over securities on request. Payment to a trustee under a deed of assignment for the benefit of creditors, if made after knowledge of an act of bankruptcy, is not a protected transaction : *Davis v. Petrie* [1905] (6).

[They were stopped.]

Buckmaster, K.C., and *Cassel*, for the respondent, the official assignee :

Unless some limitation is put upon the doctrine of relation back it will be impossible to carry on business. Take the case of a livery-stable keeper, who is keeping a man's horses for him, and has notice of an act of bankruptcy committed by the owner. He cannot hand them back, but must keep them for three months ; and he cannot recover the cost of their keep. If no adjudication follows, the title of the owner has never been interrupted.

[*VAUGHAN WILLIAMS, L.J.*, referred to *Donald v. Suckling* [1866] (7).]

Different questions may conceivably arise as between pledgor and pledgee. If there is to be no modification of the general principle,

(5) 8 Ch. D. 367 ; 48 L. J. Bk. 15 ; 38 L. T. 663 ; 26 W. R. 646.

(6) 12 Manson, 244 ; [1905] 2 K. B. 528 ; 74 L. J. K. B. 785 ; 93 L. T. 511 ; 54 W. R. 30 ; 21 T. L. R. 610.

(7) 7 B. & S. 783 ; L. R. 1 Q. B. 585 ; 35 L. J. Q. B. 232 ; 12 Jur. (N.S.) 795 ; 14 L. T. 772 ; 15 W. R. 13.

persons contracting in the ordinary course of trade will be most seriously affected. The Bankruptcy Act, 1883, has not interfered with the right of third parties to hand back chattels. The securities here were of a very fluctuating and speculative character. If the bank does not hand them over, and they go down in value, who is to bear the loss? The bank is bound to deliver the securities on tender of the money, and it would not have to repay the money to the trustee in bankruptcy. Until the title of the latter is established, the rights of the person who has committed an act of bankruptcy, and the person dealing with him, are not taken away by notice of that act. The provisions of the Bankruptcy Act, 1883, ought to be modified in the way WRIGHT, J., has modified them in *In re Lawford and Lawrence* (1). Otherwise the risk of depreciation in the securities will be placed upon the bank. The distinction in that case between money and chattels is a proper distinction. In *Davis v. Petrie* (6) there was a consideration which ought to have been before the Court, but was not. If the principle of that case be acted upon, it must follow that the same persons will have to pay the money twice over. The transaction in this case is outside sections 43 and 49 of the Bankruptcy Act, 1883 (2), just as the transaction in *In re Lawford and Lawrence* (1) was. It is a dealing by a secured creditor with his security in order to obtain payment. The Bankruptcy Act does not interfere with the rights of a secured creditor to realise or deal with his security : section 9, sub-section 2. He could have brought an action for foreclosure, and could have obtained the usual decree whether an act of bankruptcy had been committed or not. If the mortgagee can exercise his power of sale and foreclose, it must follow that the mortgagor can pay. The right of foreclosure necessarily involves the correlative right of redemption. The mortgagor could redeem, and the mortgagee, accepting payment from him, would be dealing with his security, and would be within the protection of section 9. But, assuming that the bank would not be justified in handing over the securities voluntarily, if they do so under compulsion of law they are absolutely protected. It is no defence to an action at law for a debt that the debtor has committed an act of bankruptcy : *Foster v. Allanson* [1788] (8). Nor is it any defence in proceedings in equity,

for the doctrine of relation back is not an equitable principle. This action must be treated either as an action for redemption or else as a common law action for the recovery of chattels.

There was relation back under 18 Eliz. c. 7: Eden's Bankrupt Law, pp. 263, 266; but exceptions have been grafted on this doctrine of relation back. If there is an order of the Court compelling payment the defendant will be protected: *Prin v. Beal* [1679] (9).

[ROMER, L.J.: No doubt after a judgment the defendant would be protected.]

Here the judgment is in favour of the plaintiffs. Though the proceedings were interlocutory they were by consent treated as the trial of the action. *Prickett and Carruthers v. Down* [1811] (10) supports the plaintiffs' case. In *Fuller v. Gibson* [1788] (11) it was held that a Court of Equity would not interfere to prevent creditors from recovering money at law after a commission had been issued against them. There is a distinction between the recovery of chattels and the payment of money. A person having chattels of another may be liable to heavy damages if he does not return them. WRIGHT, J.'s judgment in *In re Lawford and Lawrence* (1) depended largely on the decision of the Court of Appeal in *Rogers & Co. v. Lambert & Co.* [1890] (12).

It is no answer to an action against a pledgee that the pledgor has no title, or a defective title. Money paid to a landlord for rent after an act of bankruptcy cannot be recovered by the bankrupt's assignee: *Stevenson v. Wood* [1805] (13) and *Maror v. Croome* [1828] (14). The doctrine of relation back does not apply in the case of secured creditors, who on paying off the loan may recover back their securities: *Thompson v. Beatson* [1828] (15). There is a superior right on the part of the secured creditor, just as in the

(9) 3 Keb. 231; *sub nom. Pym v. Benson*, Free. K. B. 348.

(10) 3 Camp. 131.

(11) 2 Cox, 24.

(12) [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406; 39 W. R. 114; 55 J. P. 452.

(13) 5 Esp. 200.

(14) 1 Bing. 261; 8 Moore, 171.

(15) 1 Bing. 145; 7 Moore, 548; 1 L. J. (o.s.) C. P. 22.

case of a landlord who has a right of distress. This is a dealing with a security which is protected under the Bankruptcy Act, 1883, s. 9, sub-s. 2.

[They also referred to *King v. Leith* [1787] (16).]

R. J. Parker, in reply:

The securities were the securities of the bank subject to the mortgagor's rights. The tender was not a good tender. In *In re Lawford and Lawrence* (1), it was held that even a voluntary payment would be good. In *Thompson v. Beatson* (15) the right upheld was a right *in rem*. Here the right to redeem claimed is a right *in personam*. The cases of payment of rent where there was a right of distress are to be explained because the payments were really for the benefit of the bankrupt's estate. Assuming it to be correct that a defendant would be protected by a judgment at law, that does not apply in equity. There is no case which applies the principle of a legal judgment to a proceeding in equity for redemption.

[VAUGHAN WILLIAMS, L.J., referred to *Coppendale v. Bridgen* [1759] (17).]

It is not really necessary to go into the earlier decisions. In 6 Geo. 4, c. 16, ss. 63 and 64, it was provided that there should be conveyance of the bankrupt's property to his assignees. There were similar provisions in all the earlier Bankruptcy Acts, but the law has since been altered. In *Davis v. Petrie* (6) it was held that there would have been an answer to a common law action for debt.

[VAUGHAN WILLIAMS, L.J., referred to *Wood v. Dunn* [1866] (18) and *Allen v. Dundas* [1789] (19).]

The cases on relation back are collected in Williams's Bankruptcy Practice, 8th ed., pp. 181 and 182.

(16) 2 Term Rep. 141.

(17) 2 Burr. 814.

(18) 7 B. & S. 94; L. R. 2 Q. B. 73; 36 L. J. Q. B. 27; 15 L. T. 411; 15 W. R. 180.

(19) 3 Term Rep. 125.

The property should at any rate be kept *in medio* until it is seen whether bankruptcy ensues.

Cur. adv. rult.

August 9.

FLETCHER MOULTON, L.J., read the judgment of the COURT. After stating the facts, he proceeded : Before passing to the substantial question in this case, we hold that the consent to treat the motion as the trial of the case does not in any way affect the rights of any of the parties. In a case like the present, where all the facts are before the Court, such a procedure is nothing more than a legitimate device on the one hand to expedite the final hearing, and, on the other, to save the time of the Court from being taken up uselessly.

The arguments in this case have raised important and difficult questions involving a consideration in its most general form of the effect of the provisions of section 48 of the Bankruptcy Act, 1883, by virtue of which the title of the trustee in bankruptcy relates back to the earliest act of bankruptcy committed by a bankrupt within a period of not more than three months prior to the presentation of the bankruptcy petition. These arguments fall under two heads, the first dealing with the general power of a debtor who has committed an act of bankruptcy to use the Courts for the purpose of enforcing his rights against third parties, and the second dealing specifically with his power of enforcing, either with or without the assistance of the Courts, the special rights which exist in the case of a person who has borrowed money on security. It will be convenient to deal with the points in this order.

The argument of the respondents under the first head was as follows: Relation back of the title of the trustee in bankruptcy (meaning thereby the person in whom the bankrupt's estate becomes vested by the bankruptcy, by whatever name he may have been called) has existed under English statute law ever since 13 Eliz. c. 7. In that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy—that is, he was entitled to the possession of the bankrupt's property such as it was at that date. The effect of subsequent legislation has been not to create but merely to limit this relation back until, under the Acts now in force, its period has been reduced to a maximum of

three months, so that if the requisite bankruptcy proceedings are not taken within that period the act of bankruptcy ceases to be effective, and there can be no relation back to the date of that act of bankruptcy, even though bankruptcy should subsequently supervene. But it is urged that this process of limitation of the extent of relation back has not altered its nature. Numerous cases under the earlier statutes were referred to which establish that an act of bankruptcy in the plaintiff, though known to the defendant, constituted no defence at common law to an action for debt, and one case was cited to us to show that a Court of Equity would decline to interfere with an action at common law if brought under such circumstances. It was contended, therefore, that relation back had no operation where legal proceedings were concerned, but only where payment was made voluntarily and not under legal compulsion, and it was suggested that the explanation of this apparent contradiction of the doctrine that a debtor may not pay a debt to his creditor after notice of an act of bankruptcy available for adjudication is that the legal proceedings enable the defendant in the action to obtain a valid discharge of his debt (which could not otherwise have been given to him by his creditor) by reason of the well-established doctrine that payment under the order of a Court of competent jurisdiction is a complete answer to a claim. The results of such a doctrine are startling. Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands or to make payments to his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy because the debt may by subsequent bankruptcy proceedings be turned into a debt due to his trustee and not to himself. This is a principal and fundamental part of our bankruptcy administration, and yet if the doctrine contended for were established the mere issue of a writ would nullify the whole of the precautions taken by the Legislature in this respect. The debtor having no defence could not prevent judgment being recovered and execution had, and if such claims could thus be enforced notice of an act of bankruptcy would be no impediment to a debtor effectively collecting and getting into his

own hands all moneys due to his estate. We are of opinion, however, that this doctrine is not well founded.

For the purpose of deciding this point it is necessary to examine carefully the exact legal position of a man who has committed an act of bankruptcy under the statutes at present in force. Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made the whole of the assets vest in his trustee as from the date of the act of bankruptcy. He is therefore in the position that, should such a contingency occur, he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice. Similarly with regard to the debts and other *chooses in action* which form part of his estate, he cannot collect them, or give a valid discharge for them, and any one making a payment to him with notice of the act of bankruptcy does so at his peril. But these statutory provisions have been enacted for the benefit only of the creditors of the bankrupt, and not for the benefit of his debtors. They are not intended in any way to weaken or postpone the duties of the debtors of the estate to discharge their obligations to it, nor is this period of three months from the act of bankruptcy intended to act in anywise as a *moratorium* to those debtors so as to give them relief or respite from payments immediately due. It may be greatly in the interest of the estate that these obligations should be promptly enforced, and therefore the probable imminence of effective bankruptcy proceedings furnishes no motive to the Court for interposing any delay in the use of its normal procedure to compel their fulfilment. But the debtor is the only person who at the moment can initiate legal proceedings for this purpose, and hence the Courts have naturally refused either to treat him as incapable of bringing an action, or to regard notice of an act of

bankruptcy on his part as affording a defence to such an action if otherwise well founded. The difficulties and complications that arise from his commission of an act of bankruptcy have in their nature nothing in common with matter of defence. They do not weaken the obligations of the defendant in such an action, they only affect the question who is to benefit by the performance of those obligations.

But although there is no reason why any delay should be interposed in requiring the defendant in such a case duly to discharge his legal liabilities, it does not follow that the consequence of a judgment against him ought to be that the money recovered is paid to the plaintiff. The statutes clearly provide that payments shall not be made to the debtor with knowledge of the act of bankruptcy, thus indicating that the law does not consider him the proper person to collect his estate. Now, it is quite true that if payment be made under order of the Court, the defendant who makes the payment obtains thereby a valid discharge; but so far from this fact establishing the right of the plaintiff to receive the results of the judgment, it only puts the Court on its guard against allowing its process to be used as a means of defeating the clear purpose of the bankruptcy laws. The powers of the Court are not so limited that it cannot prevent such a result. The safe and, in our opinion, the right course for the Court to pursue after notice of an act of bankruptcy on the part of the plaintiff, is to direct the money recovered from the defendant to be kept in Court until it shall be seen whether the person who is entitled to it is the plaintiff or the representative of his estate. This is the natural and proper result of the action, because the Court, being made aware of the act of bankruptcy, is informed of the flaw in the plaintiff's title, and while it can decide that the defendant is liable to pay, cannot at the moment decide who is entitled to receive the money recovered under the judgment. We are aware that in the cases which have been quoted to us no such course was pursued. We must, however, remember that prior to the Judicature Act the powers of a Court of common law to adapt its procedure to the necessities of the particular case before it were far more restricted than they are at present, when it has all the powers of the Court of Chancery. But there is a further reason. Under the older Acts the relation back

was unlimited as to time. Under the statute of Elizabeth bankruptcy proceedings might be taken at any date, and the title of the assignee would relate back to the earliest act of bankruptcy, so that during the whole of the rest of the man's life there would be the possibility of setting aside any transactions relating to his then estate to which he had been a party. This was so extravagant and harsh that the Courts would naturally lean against the application of the principle and would be unlikely to exercise any powers they might possess of keeping the results of a judgment in suspense for what might, and perhaps must, be an unlimited time. Having established the principle that the judgment constituted a good discharge to the defendant, they were almost forced to allow the creditor to enjoy the results of the judgment, because there might for an indefinite time be no other representative of the estate. If the judgments in the case of *Foster v. Allanson* (8) (which is relied on as establishing that an act of bankruptcy by the plaintiff is no defence) be examined it will be seen that the Judges gave weight to the consideration that a long time had elapsed since the act of bankruptcy had taken place, and that further bankruptcy proceedings were unlikely. They also expressly guard themselves from being supposed to say that payment in such circumstances under a judgment obtained by collusion would be a good discharge; though it is difficult to understand what collusion could exist in the payment of a debt admittedly due, and which they had just decided was enforceable, if it did not mean that the process of law was being used by the parties to evade the responsibilities imposed by the bankruptcy laws. The period during which bankruptcy proceedings must be taken so as to give rise to relation back are so definitely limited under the present laws to the comparatively short period of three months that the Court is faced by no such difficulty, and, in our opinion, it is its duty to give full effect by all the means which its procedure permits to the substance of the bankruptcy enactments with regard to the property of a man who has committed an act of bankruptcy; and the procedure which we have indicated appears to us to be within the power of the Court and to be effective for this purpose, and it should therefore be followed.

We have examined thus fully the case of the recovery of a debt

after notice of an act of bankruptcy by the plaintiff, because it is the simplest case of legal proceedings for collecting the estate, and because the decisions in relation to it were those mainly relied on by the respondents to support their contention that notice of an act of bankruptcy has no effect upon legal proceedings. But the actual case before us is the more complicated case of a secured creditor, and we will now pass to the second point, which deals with the special rights arising from the existence of that relationship. In the present case tender of the amount due to the bank was made by the defaulting debtors and the official assignee of the Stock Exchange jointly, and the action is brought in their joint names. But for simplicity's sake we shall assume that it was done by the debtors alone. The addition of the assignee could not give additional rights to or impose additional obligations upon any one, seeing that his title rested on an assignment which was in itself an act of bankruptcy. The question therefore is this: Has a person who has committed an act of bankruptcy the right to require a secured creditor who has notice of it to give up his securities on payment of the amount due; and can he, in case of refusal, enforce that right by action? It was at first urged that section 9, sub-section 2, of the Bankruptcy Act, 1883, assisted the respondents. The sub-section reads as follows: "But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." We are of opinion that this sub-section has no application to the present case. Even if the secured creditors might safely have accepted the money and given up the securities under that section, they have not done so; and this is an action brought against them to compel them to do so. An enabling provision such as the one referred to imposes no obligation on the secured creditor, in whose interests it is passed, to act under the powers there given, and therefore could not support the present action. But although it is not necessary to pronounce any opinion on the subject, it must not be supposed that we give any countenance to the view that this sub-section would entitle the creditor to receive payment of his debt from his debtor and give up the securities provided he had notice of the act of bankruptcy. The invalidity of such a transaction would arise not

from any limitation in the creditor's power of dealing with the securities, but from the fact that the person who proposed to pay the money was personally incapacitated from making any such payment or from receiving the securities in return for the same. This is no real limitation of or encroachment upon the creditor's power to deal with the securities. It is only a consequence of his debtor having incapacitated himself from tendering the money.

The main question, however, depends on the point decided by Mr. Justice WRIGHT in the case of *In re Lawford and Lawrence* (1). The decision in that case was, of course, binding on Mr. Justice BUCKLEY, and warranted and indeed compelled him to decide the present case in the way that he did decide it. In that case the learned Judge held that a pledgee of goods remained subject to the duty to re-deliver the goods to the pledgor on receipt of the money due, and had a right to discharge himself of that liability under the contract, even though the pledgor had to his knowledge committed an act of bankruptcy prior to the tender of the money. He seems to have been influenced in his decision by a supposed distinction between goods and money in respect of the relation back of the title of a trustee under section 48 of the Act of 1883 and the provisions as to the protection of certain *bonâ fide* transactions under section 49 of that Act. We can see no justification for holding that there is any such distinction between goods and money, nor do the decisions give warrant for it. Section 48 relates generally to the property of the bankrupt without distinguishing whether it is goods or money, and section 49 speaks of "payment or delivery to the bankrupt," the word "delivery" obviously referring to the delivery of goods. Nor is there any reason in the nature of things why the Bankruptcy Act should make any such distinction between goods and money. In our opinion the learned Judge failed to realise that by the act of bankruptcy the pledgor disqualified himself from making a tender to his pledgee, and that therefore it was not open to the latter to accept the money. We are of opinion, therefore, that a secured creditor is not entitled to receive payment of the debt from his debtor after notice of an act of bankruptcy. But, as in the case which has already been examined at length, we see no reason why this

should prevent the help of the Courts being called in to render effective the obligations of third parties towards the debtor or his estate. There seems to us to be no sufficient ground why notice of an act of bankruptcy should necessarily form a defence to an action of redemption any more than to one of debt subject to the Court properly safeguarding the consequences of its acts.

But the problem here is much more complex. In the first case, it is clear that the Court must do nothing to prevent the creditor from dealing with the securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor so as to repay himself the money due to him. Nor can the Court require the creditor to surrender the securities without authorising the payment to him of the amount due thereon. But, even with these restrictions, the aid of the Court may with advantage be invoked in many cases. Where as in the present case there is an assignee who is not incapacitated from making payments, the Court might direct the defendants to deliver up the securities on payment by the assignee of the amount due, such securities to be held by him until it is decided whether bankruptcy will ensue or not. In such a case, inasmuch as the Court would act upon equitable principles, the assignee would, in case of bankruptcy supervening, be relegated to the position of the secured creditors, and the trustee in bankruptcy could only obtain the securities by repayment of the sum paid by the assignee to obtain their delivery over to him. And, even in certain cases where the action was brought by the bankrupt alone, the Court might sanction the payment by the bankrupt himself in order to save the estate from suffering disproportionate injury on principles analogous to the cases in which the Court has held that payments to save forfeiture were good against the trustee in a subsequent bankruptcy where the estate has benefited by the forfeiture having been thus averted. But we apprehend that, in cases where it was not clearly to the interest of the estate that the securities should be redeemed, the Court would hold its hand and would not permit the debtor's estate to be used in this way until it was clear whether or not the debtor or his trustee in bankruptcy were the party entitled to redeem. A creditor is a secured creditor whether or not the securities are adequate to protect him from loss, and the Court would, I think, be averse to authorise an election by

the debtor to redeem the securities when it might well happen that his trustee in bankruptcy might prefer not to do so.

In the present case, the learned Judge has, by his judgment, treated the defendants as having wrongfully refused to allow the debtors or their assignee to redeem. For the reasons above given, we are of opinion that this judgment was wrong, and should be set aside. If the assignee is prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings are taken, or the period of three months has expired, we are of opinion that we ought to make an order empowering him so to do. But, if he is not, we do not think that we ought to give any immediate judgment in this action, but ought to direct it to stand over until it can be seen who is the person entitled to redeem. There is no such clear balance of advantage shown by the evidence as would, in our opinion, justify us in treating this as a case in which a payment should be made of the nature of salvage. But, whatever be the order in these respects, the defendants are entitled to their costs of action, as well as to interest on the amount due until actual repayment, and they are entitled until repayment to exercise any rights they may possess enabling them to realise the securities. They are in the position of secured creditors to whom no tender has been made, because the so-called tender before the action was one which they were not entitled to accept.

Appeal allowed.

Solicitors : *Hollams, Sons, Coward & Hawksley*, for the Appellants.
Morley, Shireff & Co., for the Respondents.

PRESTON'S TRUSTEE v. COOKE.

1906, July 13, 14, 16. NEVILLE, J.

Bankruptcy—Undischarged Bankrupt—After-acquired Equitable Real Estate—Equitable Mortgage—Intervention by Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54, 168.

An undischarged bankrupt cannot, even before the intervention of his trustee in bankruptcy, deal with real estate acquired after his bankruptcy, so as to give the person with whom he deals, even though a *bond fide* purchaser for value without knowledge of the bankruptcy, a good title as against the trustee.

In this respect it makes no difference whether the interest of the bankrupt in the after-acquired real estate be equitable or legal.

Decision of CHITTY, J., in the case of legal real estate in *In re New Land Development Association and Gray* (1), followed in the case of equitable real estate.

TRIAL OF ACTION.

The plaintiff was the Official Receiver of the bankruptcy district of the County Court of Gloucestershire, holden at Cheltenham; and, as such, was the trustee of the property of Guy Roy Richard Preston (hereinafter called the bankrupt), who was adjudicated bankrupt by the said Court on 10 November, 1893, and had not since obtained his discharge.

By a deed of conveyance dated 19 November, 1901, certain freehold property situate in the parish of East Barnet, in the county of Hertford, and hereinafter called the Hill Crest estate, was conveyed, for the consideration of 3,200*l.*, for an estate in fee-simple to a certain John Marston Birkett, of Chesterfield, in the county of Derby. The purchase-money of 3,200*l.* was, however, paid by the bankrupt.

By an indenture of lease dated 20 December, 1901, the Hill Crest estate was demised by the said John Marston Birkett to the bankrupt (under the *alias* of John Hervey Redgrave) for the term of ninety-nine years from 29 September, 1901. Evidence, however, was tendered at the hearing of the present action to prove that the purported execution of this document by John Marston Birkett was in reality a forgery by the bankrupt.

By an indenture of mortgage dated 10 February, 1902, the said

(1) [1892] 2 Ch. 138; 61 L. J. Ch. 323; 66 L. T. 404; 40 W. R. 295.

term of ninety-nine years in the High Crest estate was demised by the bankrupt (under the *alias* of John Hervey Redgrave) to the defendant for all the residue then unexpired of the said term (less the last day thereof), in order to secure repayment of the sum of £1,750*l.*

The present action was now brought by the plaintiff asking (*inter alia*) for a declaration that he was entitled, as trustee of the property of the bankrupt, to the High Crest estate for an equitable estate in fee-simple free from and unincumbered by the said indenture of mortgage dated 10 February, 1902.

The plaintiff had not intervened, either orally or by letter, prior to the mortgage of 10 February, 1902, so as to claim the Hill Crest estate as part of the property held by himself as the trustee in bankruptcy of the bankrupt.

Jenkins, K.C., and Cordery, for the plaintiff:

Since the purchase-money for the Hill Crest estate was advanced by an undischarged bankrupt, it follows that, although the legal fee-simple is still in Birkett, yet the equitable fee-simple passed, immediately on the execution of the conveyance, to the plaintiff, as trustee in bankruptcy of the man who advanced the money, by virtue of sections 44, 54, and 168 of the Bankruptcy Act, 1883 (2).

It is true that in *Cohen v. Mitchell* [1890] (3) it was decided that,

(2) Bankruptcy Act, 1883, s. 44 :
“The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise the following particulars :

“(i) All such property as . . . may be acquired by or devolve on him before his discharge . . .”

* * * * *
Section 54, sub-section 1 : “Until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest

in the trustee.”

* * * * *
Section 168, sub-section 1 : “In this Act, unless the context otherwise requires—

* * * * *
“‘Property’ includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.”

(3) 7 Morrell, 207; 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551.

where an undischarged bankrupt enters into transactions in respect of his after-acquired property before the intervention of the trustee, then all such transactions are valid as against the trustee in favour of any person entering into such transactions *bona fide* and for value, and whether with or without knowledge of the bankruptcy. It was subsequently held, however, by CHITTY, J., in *In re New Land Development Association and Gray* [1892] (1), that this general rule does not apply in the case of real estate; and that an undischarged bankrupt cannot, even before the intervention of the trustee, convey after-acquired real estate, even to a *bona fide* purchaser for value, so as to defeat the title of the trustee. In the Court of Appeal this case was decided on another ground, but the above decision of CHITTY, J., was approved of during the course of argument by both KAY, L.J., and LINDLEY, L.J. The exception thus grafted on to the principle of *Cohen v. Mitchell* (3), by CHITTY, J., in *In re New Land Development Association and Gray* (1), has since been recognised by FARWELL, J., in *Bird v. Philpott* [1900] (4), and by KEKEWICH, J., in *London and County Contracts v. Tallack* [1903] (5). This being so, the equitable fee-simple in the Hill Crest estate passed to the plaintiff at the moment of the conveyance of the legal fee-simple to Birkett, and the plaintiff has therefore an equity which has priority to the equity subsequently acquired by the defendant under his mortgage.

Upjohn, K.C., and A. R. Kirby, for the defendant:

The exception established in *In re New Land Development Association and Gray* (1) to the general principle laid down in *Cohen v. Mitchell* (3) applies to the case of legal real estate only; it has never been applied, and ought not now to be extended, to the case of equitable real estate. CHITTY, J., indeed, himself refused to extend it to leaseholds in *In re Clayton and Barclay's Contract*, [1895] (6). That being so, since the trustee in the present case has failed to intervene prior to the date of the mortgage to the defendant, the mortgage has priority to the claim of the trustee.

(4) 7 Manson, 251; [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110.

(5) 51 W. R. 408.

(6) 2 Manson, 345; [1895] 2 Ch. 212, 215; 64 L. J. Ch. 615; 72 L. T. 764; 43 W. R. 549; 59 J. P. 489; 13 Rep. 556.

Jenkins, K.C., in reply :

There is no authority, and no good reason, to draw any distinction in this matter between legal and equitable real estate. A broad distinction, however, does undoubtedly exist between real and personal estate which justifies the distinction hitherto drawn.

NEVILLE, J., after stating the facts, and after saying that the execution of the lease of 20 December, 1901, was, in his opinion, a forgery, and, therefore, of no validity, continued : That being so, the legal estate is still vested in John Marston Birkett, and the plaintiff and defendant alike, accordingly, have nothing more than an equity. In determining the priority of those two equities, I am brought at once to the single point that still calls for consideration—Did the equitable estate in the fee vest in the trustee in bankruptcy upon the execution of the conveyance to Birkett, or did it not vest until some intervention by him ? If the latter be the case then there was no intervention on his part till too late to claim priority of time over the defendant in the present case.

Now, with regard to this question, I have to consider the meaning of the cases to which I have been referred by counsel. I start with the case of *Cohen v. Mitchell* (3), which is a decision by the Court of Appeal. The proposition there laid down is no doubt, on the face of it, a proposition sufficiently wide to cover property of all descriptions, whether real or personal ; and the proposition is to the effect that, with regard to after-acquired property of a bankrupt, that property does not vest in his trustee in the bankruptcy until after some intervention on the part of that trustee has taken place, in cases in which the bankrupt has dealt with the property with some *bona fide* third person.

Now the consideration of that case came before Mr. Justice CHITTY in *In re New Land Development Association and Gray* (1), in which the question was whether that general proposition was applicable to the case of the purchase of real estate, to one undivided moiety of which a certain person was entitled, and which he had, in conjunction with his co-tenant, conveyed to a certain purchaser, he being at the time an undischarged bankrupt. Mr. Justice CHITTY held that it did not so apply ; and, after referring to sections 44, 54, and 168 of the Bankruptcy Act, 1889, he

proceeds : "Reading these three sections without referring to any of the authorities, it seems clear that a moiety of this real estate, which devolved upon the bankrupt W. Shurley before his discharge, is after-acquired property which vested in the Official Receiver as trustee. But it is unquestionable that there has been a series of decisions on this Act, and on similar earlier Acts, which show by judicial interpretation that the language of the Legislature as to the after-acquired property of the bankrupt is not to be read exactly as it stands—in other words, the Courts have decided that there are exceptions from the property which *prima facie* ought to vest in the trustee as after-acquired property ; the decisions include, money earned by a bankrupt in carrying on a business ; they include *chooses in action*, and other personal estate belonging to the bankrupt, and goods and chattels ; but I know of no decision that the principle upon which these authorities are founded includes real estate." Now I take the meaning of that statement to be this—that, according to Mr. Justice CHITTY's decision, when you read the Act of Parliament in the light of the decisions of the Court, you find that after-acquired property, so far as it consists of personal property, does not vest in the trustee in bankruptcy until after intervention on his part ; and that the learned Judge excludes the extension of that exception to the vesting of property in the bankrupt's trustee in the case of real estate. A reason is given for this exclusion : "the argument really amounts to this, that after-acquired real estate vests in the bankrupt, and remains vested in him till the trustee, by oral request or by a letter, intervenes and claims it ; and thereupon the legal estate shifts and passes to the trustee. It was not suggested that any conveyance is necessary ; it is said that the legal estate passes by virtue of the statute, by an assurance hitherto unknown to the law—*i.e.*, on an oral request, possibly verified by statutory declaration, or by virtue of a letter, which, as a record of the transaction, would have to be preserved as a document of title. I think this is too wide a departure from the words of the Act of Parliament . . ." Therefore the learned Judge excludes real estate from the operation of the judicial decisions, on the ground that it involves a shifting of the legal estate which, he thinks, is not established by the cases.

Now, so far as the principle of the decision is concerned, I confess

that I cannot myself see why, if you are depending on the construction of the statutes, as one undoubtedly is, and professes to be, in these decisions, the statute should not just as well have declared the legal estate to shift, in the case of real property, only upon the intervention of the trustee from the bankrupt to the trustee, and it has, according to these decisions, declared it so to shift in the case of personal property. The decision, however, is there; and, although the case was taken to the Court of Appeal, yet, unfortunately for me, it was not there decided upon the point that is now in question. So far, however, as I understand the decision of the Court of Appeal, the learned Judges in that Court approved, so far as their opinion went, of the judgment of Mr. Justice CHITTY in that respect. Both Lord Justice KAY and Lord Justice LINDLEY made interlocutory remarks in the course of the argument, in which, in their opinion, they exclude real estate from the operation of the decision in *Cohen v. Mitchell* (3); and "real estate" apparently is spoken of by them without reference to the question of whether they are dealing with legal real estate or only with equitable real estate. I think it would be impossible for me, in the face of that expression of opinion on the part of the Lords Justices, to differentiate in the present case between a legal fee and an equitable fee in land.

To make the difficulty yet greater, as it appears to me, the question of leaseholds has been considered at a later period by the same Judge (Mr. Justice CHITTY) in *In re Clayton and Barclay's Contract* (6). He there comes to the conclusion that a leasehold interest is within the proposition in *Cohen v. Mitchell* (3), and is not affected by the decision in *In re New Land Development Association and Gray* (1). What he says about it is this: "Possibly some of the reasons that I gave for the exception of real estate might apply, but with diminished force, to the case of a lease for a term of years with covenants; but I have now to consider whether any such reasons would justify me in introducing this further limitation. It appears to me that I ought not to attempt to introduce any further limitation. The language of the Court of Appeal in *Cohen v. Mitchell* (3) is large enough to include all property, and certainly large enough to include a chattel interest in land; and I think that I ought to consider myself bound, as I do, by the proposition that they laid down, and that this case falls within it."

Now here the learned Judge draws a distinction between a leasehold interest in real estate and a freehold interest in real estate which I confess that I find very great difficulty in understanding on any broad principle of any sort or kind. It is perfectly true that in the one case you are dealing with a chattel estate or personal estate, and in the other with real estate. But why there should be a distinction between real estate and personal estate in this regard I confess I do not think has been satisfactorily explained by the decisions which have been cited to me. But, as I said before, I think that it is proper for me to follow the opinion expressed by the Lords Justices, and not to differentiate between an equitable interest and a legal interest in real estate, but to treat the matter as at present lying between the broad divisions of property—real estate on the one hand, and personal estate on the other. That is consistent with all the decisions which have hitherto been come to, and that, I think, is the proper conclusion at which I ought now to arrive.

I can only add that I hope that, either in this or some similar case, the point now raised may at some not distant date come before the Court of Appeal, in order that it may be put on a more satisfactory footing than that on which it now rests.

Solicitors: *Burgess, Taylor & Tryon*, for the Plaintiff.
Phelps & Wallace, for the Defendant.

DAVIS v. PETRIE.

1906, August 3. C. A. COLLINS, M.R., FLETCHER MOULTON AND FARWELL, L.J.J.

Bankruptcy—Assignment for Benefit of Creditors—Act of Bankruptcy—Payment of Debt to Assignee—Bankruptcy Petition—Right of Trustee to Payment of Debt—Receipt of Balance from Assignee—Election—Following Debt into Hands of Trustee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43.

Where a debtor pays to an assignee under a deed of assignment for the benefit of creditors generally a debt thereby assigned, and subsequently a petition in bankruptcy is presented and a receiving order made upon the act of bankruptcy committed in the execution of the deed, the trustee in bankruptcy may claim repayment from the debtor of the debt so paid to the assignee, unless the debtor can show that the money paid by him, or some part thereof, has come to the hands of the trustee in bankruptcy.

Judgment of Divisional Court (1) affirmed.

APPEAL from the judgment of a Divisional Court reversing the judgment of the Judge of the Brompton County Court.

The plaintiff, who was the trustee in bankruptcy of one Watson, a builder, sued the defendant, Mrs. Petrie, for the sum of 21*l.* for work done for her by the bankrupt.

It appeared that on 5 June, 1903, Watson executed a deed of assignment for the benefit of his creditors, one Afford being appointed trustee thereunder. On 6 June, 1903, Afford wrote to the defendant stating the fact that he had been appointed trustee under the deed executed by Watson for the benefit of creditors, and requesting her to pay to him the amount of her debt to Watson—21*l.* In consequence of this letter, on 12 June the defendant paid Afford the 21*l.* by cheque.

Afford in this way collected about 500*l.* from various debtors to Watson, and, having no banking account of his own, paid the amounts collected into his wife's account.

A petition in bankruptcy having been presented against Watson alleging the execution of the deed of 5 June, 1903, as an act of bankruptcy, a receiving order was made against him on 20 August, 1903, and thereupon he was adjudicated a bankrupt.

The plaintiff, as trustee in the bankruptcy, applied to Afford for an account of all his dealings with the estate and for payment of

(1) 12 Manson, 244; [1905] 2 K. B. 528; 74 L. J. K. B. 785; 93 L. T. 511; 54 W. R. 30; 21 T. L. R. 610.

the balance in his hands. There then remained in Afford's hands out of the 500*l.* received by him, after making allowance for payments, a balance of 100*l.*

On 8 September the sum of 100*l.* was paid to the plaintiff by a cheque drawn upon Mrs. Afford's banking account.

The plaintiff having been unable to obtain from Afford the 21*l.* paid to him by the defendant, now sued the defendant for the same. By her defence she pleaded the payment to Afford, and the question was whether that payment discharged her from the debt in view of the fact that the deed of 5 June, 1908, was rendered void by the bankruptcy supervening within three months.

The County Court Judge gave judgment for the defendant. On appeal the Divisional Court (Lord ALVERSTONE, C.J., KENNEDY, J., and RIDLEY, J.) reversed the judgment of the County Court, and entered judgment for the plaintiff.

The defendant appealed.

Frank Mellor, for the defendant:

The trustee in bankruptcy has in a case like the present two alternative courses open to him, and must elect between them: he may treat the assignee under the deed of assignment as a wrong-doer, and sue him for conversion, in which case he might also sue the debtors to the estate for the debts due from them on the footing that they have never been paid; or he may treat the assignee as his agent, and recover from him, as money had and received to his use, the debts which have been paid to and received by him: *In re Riddeough, Ex parte Vaughan* [1884] (2), and *In re Ely, Ex parte Trustee* [1900] (3). If he does any act adopting what has been done by the assignee, he thereby constitutes him his agent, after which he cannot treat as trespassers either the assignee or those who were parties with him to the act which has been adopted: *Smith v. Baker* [1878] (4). A trustee in bankruptcy will be held strictly to what is equitable: *In re Rivett-Carnac, Ex parte Simmonds* [1885] (5); and will not be allowed after taking one

(2) 1 Morrell, 258; 14 Q. B. D. 25; 33 W. R. 151.

(3) 48 W. R. 693.

(4) L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637.

(5) 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 439; 34 W. R. 421.

course to recur to an alternative and inconsistent course. At the least, the plaintiff, having received one-fifth part of the amount collected by the assignee, must give credit for one-fifth part of the 21*l.* sought to be recovered. This will affect the costs of the action.

S. R. Earle, for the plaintiff, was not called upon.

COLLINS, M.R. : The first point argued for the appellant is that, by taking the sum of 100*l.* from the assignee under the deed of arrangement, the trustee in bankruptcy made the assignee his agent in regard to the whole liquidation of the bankrupt's estate and thereby estopped himself from suing any third person who had paid to the assignee any debt due to the estate, the assignee having become the agent for the purpose of giving a discharge to third persons. That argument involves this—that in these matters there can be only one election, and that if the trustee has adopted as his own any one act of the assignee in receiving a debt from a debtor to the estate, he debars himself from treating the assignee as a tortfeasor in respect of any other intermeddling with the business of the bankrupt and from claiming any debt due from any debtor who sets up as a defence that he has paid the debt to the assignee and in doing so has paid it to the trustee's agent. However that may be as between the trustee and the assignee, no such proposition can be maintained as a general proposition as between the trustee and third persons. The fact that the assignee has received and accounted for some part of the proceeds of the estate does not alter the attitude of the trustee towards all debtors of the estate who may have paid to the assignee the debts they owed to the estate. Suppose an action brought by the trustee against a debtor to recover a debt due to the estate, and a plea that the trustee had received from an assignee for the benefit of creditors a sum of 10*l.*, part of the bankrupt's estate collected by the assignee, and that the defendant, the debtor, had paid the debt to the assignee, and therefore claimed to be relieved from paying it again to the trustee. That would be no answer to the action. To afford an answer it must be alleged and proved that the defendant's money, or part of it, had come to the hands of the trustee. To hold otherwise would be to carry the

doctrine of election too far. As between two persons, one who has elected to act upon one view of his rights cannot, as against the other or those claiming under that other, recur to the alternative and inconsistent right. But when dealing with third persons, no parties to the election, the actual facts determine the position. So in the present case it is a question of fact, aye or no was the assignee the agent for the trustee to receive payment of this debt? If yea, the defendant has paid the debt, and the plaintiff fails; if nay, there is no defence, and the plaintiff succeeds. The mere fact that the plaintiff, as trustee in bankruptcy, has adopted one part of the transactions effected by the assignee and has taken over a sum of money collected by the assignee and remaining in his hands, and has treated that as part of the bankrupt's estate, does not affect the rights of the trustee as against third persons who took no part in this transaction. In the present case what was received was a sum of money; but if it had been a carriage or any other chattel the effect would have been the same. The receipt of the money or the chattel by the trustee is only one circumstance in the evidence on the question of fact whether the assignee was agent for the trustee to accept payment of the debt. There is no other evidence of such an agency; and in this state of the facts I think the true inference is that the trustee has merely accepted, as he had a perfect right to do, part of the proceeds of the bankrupt's estate which he found in the hands of a third person.

The second point is this: The sum received by the trustee from the assignee was 100*l.*, or about one-fifth part of the amount received by the latter from debtors to the estate. The defendant claims that she ought to be credited with a similar proportion of the 21*l.* sued for, and that she is entitled to a discharge *pro tanto*. If that contention prevails, the result will be to affect materially the costs of the action. The *onus* lies upon her to show that any part of the 100*l.* represents any portion of the 21*l.* But here the chain of evidence breaks down. The 21*l.* was paid into the account of Mrs. Afford, the wife of the assignee, and no one can say what was done with it after that. The process of appropriation has never been gone through, and there is no evidence that the 100*l.* contains any part of the 21*l.* This appeal must therefore be dismissed.

FLETCHER MOULTON, L.J.: I am of the same opinion. The execution of a deed of assignment for the benefit of creditors is an act of bankruptcy, and, if bankruptcy proceedings supervene within three months, the assignment becomes void as against the trustee in bankruptcy. Any one who under that assignment arrogates to himself and exercises the right to receive part of the estate as assignee for the benefit of creditors, does so at his peril, and those who act in acknowledgment of that right also do so at their peril. If bankruptcy proceedings supervene within three months, the assignee, to use the language of Mr. Justice VAUGHAN WILLIAMS, in *In re Mardon*, [1895] (6), becomes a trustee *de son tort* and is accountable for all assets of the bankrupt which have come to his hands. The trustee in bankruptcy has a right, therefore, to require him to give up those assets; and payments made to the assignee by a debtor to the bankrupt's estate are not valid payments, but are made to the wrong person, and therefore the trustee in bankruptcy may sue the debtors who have made such payments and recover all they owe to the bankrupt's estate. If a person so sued can prove that the debt which he paid to the assignee has in whole or in part been received by the trustee, that will operate *pro tanto* as a defence to the claim of the trustee. For example, suppose that in the present case a chattel, such as a carriage, being in the hands of a bailee of the bankrupt at the commencement of the bankruptcy, had been demanded and received from the bailee by the assignee for creditors, and had subsequently come into the hands of the trustee in bankruptcy: in such a case it would be most unjust to hold that that fact would not afford a good answer to an action by the trustee against the bailee. So in the case of money: no doubt money is more difficult to trace than a chattel such as a carriage, but if it can be traced the same result will follow, and it cannot be recovered again. Even if it were so mixed up with other moneys in the hands of the trustee as to be inseparable from them (a case which would differ from the present) and the Court might adopt the view that there had been a proportional payment of the amount claimed—that is to say, payment to the extent of the ratio which the amount received by the trustee bears

(6) 2 Manson, 511; [1896] 1 Q. B. 140; 65 L. J. Q. B. 111; 73 L. T. 480; 44 W. R. 111.

to the amount collected by the assignee. But in the present case there is no evidence that in receiving the 100*l.* from the assignee the trustee received any part of the 21*l.* which was owing to the bankrupt's estate. The *onus* lies upon the defendant in this case, and no effective attempt has been made to discharge it. There is, therefore, no defence to the action, and the appeal must be dismissed.

FARWELL, L.J.: I am of the same opinion. When it is once realised that equitable principles apply, this case becomes clear. The assignee under a deed for the benefit of creditors, which he knows to be an act of bankruptcy and voidable if proceedings are taken within three months, cannot, when the deed has been so avoided, impose any conditions whatever upon the trustee in bankruptcy who calls upon him to hand over assets of the bankrupt which he has collected. He must hand them over unconditionally. He has been called a trustee *de son tort*. In my opinion, it is quite an untenable proposition to say that when the trustee in bankruptcy does his plain duty in calling him to account he thereby adopts all or any of the transactions by which the assets came to the hands of the assignee. I should require further argument before deciding that any such adoption is within the power of a trustee in bankruptcy without the leave of the committee of inspection under section 57 of the Bankruptcy Act, 1883. When the trustee in bankruptcy calls upon the trustee *de son tort* to hand over assets of the bankrupt in his hands, debtors who have paid their debts to the trustee *de son tort* are entitled, if they can, to trace their money into the hands of the trustee in bankruptcy. *In re Hallett's Estate, Knatchbull v. Hallett* [1880] (7), decided that money can be followed, but the person who asserts that it is practically possible to trace it must discharge the burden of proving the assertion. In the present case the only hope of tracing the money is through the application of the principle of *Clayton's Case* [1816] (8). No effort has been made to do anything of the kind, and it is almost incredible that any such attempt could have succeeded considering the period which elapsed between the date

(7) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

(8) 1 Mer. 572.

when the 21*l.* was paid by the defendant to the assignee—namely, 20 June and 3 September, when the assignee paid over to the trustee in bankruptcy the 100*l.*; on the principle of *Clayton's Case* (8) the 21*l.* would in the interval have been completely exhausted. The result is that this appeal fails. I have only to add that nothing that we have said in any way affects the decision in *In re Riddeough, Ex parte Vaughan* (2), the trustee in bankruptcy cannot, as against the trustee *de son tort*, take advantage of the collection of assets by him without allowing him the costs of collection.

Appeal dismissed.

Solicitors : *Gerald & Arthur Marshall*, for the Appellant.

Braby & Macdonald, for the Respondent.

IN RE TYLER, EX PARTE OFFICIAL RECEIVER.

1906, November 12. BIGHAM, J.

Bankruptcy—Mortgage of Life Policies—Payment of Premiums by Third Party—Bankruptcy of Mortgagor—Death of Mortgagor—Repayment of Premiums to Third Party out of Estate.

The trustee in bankruptcy is an officer of the Court, and as such must do what the Court considers to be just.

Where life policies had been mortgaged to secure a loan from bankers and a third party had kept up the premiums on the life policies and paid the interest on the loan, the trustee in bankruptcy having become possessed of the policy moneys owing to the bankruptcy and death of the party insured, the COURT ordered the trustee in bankruptcy to refund to the third party the money expended on keeping up the premiums and interest.

ON 29 January, 1896, William Tyler committed an act of bankruptcy. On 21 April, 1896, a petition was presented against him in respect of which a receiving order was made on 16 July, 1896, and he was duly adjudicated a bankrupt on 27 August, 1896.

At the commencement of the bankruptcy the bankrupt was entitled to two policies of assurance effected on his own life with the Guardian Assurance Co., one for the sum of 300*l.* at an annual premium of 9*l.* 19*s.* 3*d.*, and another for the sum of 500*l.* at an annual premium of 16*l.* 12*s.* 1*d.*

By a mortgage dated 13 April, 1898, the said two policies were assigned to Messrs. Child & Co., bankers, to secure an overdraft of

400*l.* The mortgage contained the usual covenant to pay the interest and the premiums on the policies. Towards the end of the year 1895 the bankrupt became financially embarrassed, and he informed his wife that he was unable to continue the payment of the interest upon the loan of 400*l.* and the premiums on the said policies, and he requested his wife to make these payments for him and promised to repay her when his financial affairs were straight. In accordance with such request the bankrupt's wife instructed Messrs. Child & Co. to pay the interest due to themselves and the premiums due to the assurance company as and when they became due, and to debit her account with them with such payments, and this they continued to do from December, 1895, until the death of the bankrupt in March, 1906. The total amount which was paid by the bankrupt's wife for premiums and interest was 481*l.* 14*s.* 2*d.* In consequence of the death of the bankrupt in March, 1906, the moneys became payable under the policies. The Guardian Assurance Co. paid to Messrs. Child & Co. 986*l.* 10*s.*, being the policy moneys and bonuses due under the two policies, and there remained 514*l.* 16*s.* 8*d.* in their hands after payment of the principal and interest of their loan. This sum was, in consequence of the usual notice of bankruptcy which had been served upon them, paid to the trustee in bankruptcy.

The widow claimed to be repaid out of the sum of 514*l.* 16*s.* 8*d.* the sum of 481*l.* 14*s.* 2*d.* paid by her as premiums and interest.

Hansell, for the Official Receiver and trustee :

The bankruptcy revoked the wife's authority to pay the premiums and interest, and she can only claim, if at all, as an ordinary creditor. The person who pays the premiums to keep up the insurance has no lien on the insurance money. The trustee has no power to pay the widow the sums claimed by her. But the trustee, as an officer of the Court, will be ordered to do the fullest equity, and that even in some cases where the circumstances would give rise to no legal right, and perhaps not even to a right which could be enforced in a Court of Equity as against an ordinary litigant: *In re Rivett-Carnac, Ex parte Simmonds* [1885] (1), and Williams's Bankruptcy Practice, 8th ed., p. 201.

(1) 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 439; 34 W. R. 421.

352 IN RE TYLER, EX PARTE OFFICIAL RECEIVER. [MANSON,

Whinney, for the widow, was not called upon to argue.

BIGHAM, J.: In this case the trustee is an officer of the Court, and as such must do what the Court considers to be just. It may be that to repay these sums to the widow is not justice in law, but it is the right thing to do. It would be a great injustice if the money were not refunded ; the trustee must pay back to the widow the money she has expended on keeping up the premiums and interest.

Solicitors : *Tarry, Sherlock & King*, for the Official Receiver.

Finch & Jennings, for the Widow.



SWANLEY COAL CO. v. DENTON.

1906, August 1, 2. C. A. VAUGHAN WILLIAMS, ROMER, AND COZENS-HARDY, L.J.J.

Bill of Sale—Validity—Deviation from Statutory Form—Title Deeds included in Schedule—Assigned as Personal Chattels without creating Charge on Land—Construction—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9.

The owner of land may deal with the title deeds as mere personal chattels divorced from the land.

Dicta in Barton v. Gainer (1) approved and followed.

By a bill of sale the grantor assigned to the grantees the several chattels and things specifically described in the schedule thereto annexed then being in and about the "Lion Hotel," by way of security for a loan; and thereby covenanted to insure the chattels and things, and to pay rates and taxes in respect of the premises in which the same might be. It was further provided that the grantees should be at liberty to remove and sell the same at the expiration of five days from seizure or taking possession thereof. The schedule specifically enumerated certain furniture and effects, and concluded with "Assignment of lease of the 'Lion Hotel,' and all the muniments of title referred to in the said assignment":—

Held (by VAUGHAN WILLIAMS, L.J., and ROMER, L.J.; dissentient COZENS-HARDY, L.J.), that, according to the true construction of the bill of sale, the title deeds included in the schedule were granted as personal chattels severed from the leasehold interest to which they related, and not with the intention of creating any charge thereon, and that therefore the bill of sale was not void under the Bills of Sale (1878) Amendment Act, 1882, s. 9.

Cochrane v. Entwistle (2) distinguished.

APPEAL by the assignee of a bill of sale against a decision of the Divisional Court (Lord ALVERSTONE, C.J., KENNEDY, J., and RIDLEY, J.), reversing a decision of the County Court Judge at Dartford, and holding that the bill of sale was rendered void under section 9 of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), on the ground of nonconformity with the form prescribed by the Act by reason of the inclusion among the chattels thereby assigned of certain title deeds relating to leasehold property of the assignor.

The defendant Edmund Basil Denton was the occupier and assignee of a lease of the "Lion Hotel," Farningham, and the plaintiffs had recovered judgment against him in the County Court and put

(1) 3 H. & N. 387; 27 L. J. Ex. 390; 4 Jur. (N.S.) 715; 6 W. R. 624.

(2) 25 Q. B. D. 116; 5 L. J. Q. B. 418; 62 L. T. 852; 38 W. R. 587.

in execution. A claim was made by the appellant under a bill of sale of which he was assignee. The claim was disputed by the plaintiffs, and the appellant then issued an interpleader summons.

By the bill of sale in question, dated 5 January, 1904, Edmund Basil Denton, as mortgagor, in consideration of 300*l.*, assigned to the Charing Cross Bank, the mortgagee, "all and singular the several chattels and things specifically described in the schedule hereto annexed now being in and about the dwelling-house and premises known as the 'Lion Hotel,' Farningham, in the county of Kent, by way of security for the payment of the sum of 300*l.* and interest thereon at the rate of 30*l.* per centum per annum." The bill of sale contained covenants by the mortgagor to insure the chattels and things, and to pay rates and taxes in respect of the premises in which the said chattels and things or any of them might be. It also contained a proviso that the chattels and things thereby assigned should not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882. And it was further provided "that if the said chattels and things hereby assigned shall be seized or taken possession of by the said mortgagee in consequence of the breach of any of the covenants herein contained the said mortgagee shall be at liberty to remove or sell the same or any part thereof by public auction at the expiration of five clear days from the day of such seizure or taking possession." The schedule referred to set out a long list of personal chattels and furniture, and then came this final item: "Assignment dated 24 January, 1902 (between Walter Edward Lovegrove and Edward Richard Lovegrove of the first and second parts, and the grantor of this bill of sale, Edmund Basil Denton, of the third part), of lease (dated 18 November, 1891) of the said 'Lion Hotel,' Farningham, Kent, aforesaid, and all the muniments of title referred to in the said assignment." The County Court Judge held that the title deeds were merely personal chattels and that the inclusion of them in the schedule to the bill of sale did not avoid the same. He accordingly gave judgment for the claimant. The plaintiffs, the execution creditors, appealed to the Divisional Court, who reversed the decision of the County Court Judge and entered judgment for the plaintiffs.

The claimant, the bill of sale holder, appealed.

It was admitted that if the schedule comprised a chattel real as well as personal chattels, the bill of sale was not made in accordance with the statutory form, and was void on the authority of *Cochrane v. Entwistle* [1890] (2), and the question argued on appeal was whether on the true construction of the bill of sale the intention was to give to the grantee any charge upon the leasehold interest of the grantor in the "Lion Hotel," or a mere right to the title deeds as personal chattels.

It was stated that the title deeds had in fact been delivered to the grantee immediately or shortly after the execution of the bill of sale, but there was no sufficient evidence before the Court of this circumstance.

Hohler and Josephs, for the appellant :

The decision of the County Court Judge was right and should be upheld. The absolute owner of freehold or leasehold property can grant his title deeds to a grantee as mere personal chattels without conferring any interest in the property to which they relate: *Sheppard's Touchstone*, p. 242; *Burton's Compendium*, p. 476; *Barton v. Gainer* (1), and *Rummens v. Hare* [1876] (3). The question whether this was the intention of the parties is to be answered by a consideration of the document itself, and according to the true construction of this bill of sale it is obvious that there was no intention to assign or create a charge on the leasehold interest.

[*ROMER, L.J.*, referred to *Baynard v. Wooley* [1855] (4).]

The parcels are described in the bill of sale as chattels and things "in and about" the "Lion Hotel" itself, and it is impossible there or in the covenants and provisoos to conceive that the parties were intending to deal with the term of years in the "Lion Hotel" or with anything else than personal chattels in and about those premises. To draw a larger meaning from the schedule would be to defeat the bill of sale without any necessity for so doing. The Divisional

. (3) 1 Ex. D. 169; 46 L. J. Ex. 30; 34 L. T. 407; 24 W. R. 385.

(4) 20 Beav. 583.

Court thought the case was good but that authority does not apply as first decided against the applicant.

[They also referred to *Thomas v. Matthews*, for the reason]

J. B. Matthews, for the reason

Title deeds follow the property completely divorced from the chattels. *Barton v. Gainer* (1) 190⁵ 100, 102. Debentures. *Casberd v. Attorney General* (190⁶) 100, 102. In which it was ever seriously contended that title deeds to land passed the parchment. As the bill of sale alone, there is no assignment of 24 January, 190⁵. Title deeds were so divorced from the land as to be of no value. And the just inference from the language of the court was to create a charge on the land. This is strengthened if these title deeds are held by the bill of sale holder on completion.

[Per CURIAM: We have no such authority before us.]

Hohler, in reply.

VAUGHAN WILLIAMS, L.J.: This is a very easy one to decide. The difficulty is not at all lessened by the fact that it is the unanimous decision of other learned Judges in the Kingdom. The question is whether a bill of sale given to secure the whole question which arises is that the bill of sale, the security given, that security comprised a chattel. The argument that the bill of sale is a bad bill of sale only includes personal

(5) 13 App. Cas. 506; 68 L. J. Q. B. 102.

(6) 6 Price, 411, 441, 457.

may by grant sever the title deeds from an estate"; MARTIN said, "In Sheppard's Touchstone, p. 242, it may give or grant his deeds, i.e., the parchment, to another at his pleasure, and the grantee may them. And, therefore, if a man have an obligation, grant it away, and so sever the debt and it." And fact documents are not unfrequently handed over pose of dealing with the subject-matter of the doc- tter of property, but for the purpose of giving the hing to "sit upon"—that is, though he may take the documents, he may sit upon them until his paid or something else has been done. I only cite *ever* (1) for the proposition that the owner may deeds from his estate, and may grant those deeds documents by way of security; and in such a case the parties is not that the property should pass, documents, as chattels, and the intention of the pear from the instrument executed by them at

se matters into consideration, I think that, accord- construction, this bill of sale was not intended to on any interest in the land whatever as part of the t the grantee does not take any equitable charge think, therefore, that the appeal must be allowed.

I am greatly indebted to counsel for their full and but for which I might have arrived at what I now e been a wrong conclusion. For a long time I was sion that the appellant was wrong, and that the Divisional Court was right; but on a fuller con- arrived at a different conclusion. The question struction of the bill of sale. So far as concerns entioned in the schedule, if the effect of the bill of a charge on the land, the subject-matter of those the appellant is clearly wrong. If, on the other of the bill of sale is not to create a charge on the deal with the title deeds as documents pledged, ant is right; for although title deeds savour of

Court thought the case was governed by *Cochrane v. Entwistle* (2), but that authority does not apply unless the question of construction is first decided against the appellant.

[They also referred to *Thomas v. Kelly* [1888] (5).]

J. B. Matthews, for the respondents :

Title deeds follow the property to which they relate, and must be completely divorced from the land before they become personal chattels. *Barton v. Gainer* (1) was a case of the gift of railway debentures. *Casberd v. Attorney-General* [1819] (6) is the only case in which it was ever seriously contended that the deposit of a title deed to land passed the parchment and nothing more. Looking to the bill of sale alone, there is no ground for saying that the deed of assignment of 24 January, 1902, or the other muniments of title were so divorced from the land as to become mere personal chattels ; and the just inference from the bill of sale itself is that the intention was to create a charge on the leasehold interest, and that inference is strengthened if these title deeds were in fact handed over to the bill of sale holder on completion.

[Per CURIAM : We have no satisfactory evidence on that point before us.]

Hohler, in reply.

VAUGHAN WILLIAMS, L.J. : This is an unusual case and not a very easy one to decide. The difficulty of dealing with the matter is not at all lessened by the fact that we are dealing with an appeal from the unanimous decision of the LORD CHIEF JUSTICE and two other learned Judges in the King's Bench Division. The question is whether a bill of sale given to secure a loan is void or not, and the whole question which arises is what, looking to the schedule to the bill of sale, the security given by the grantor really was. If that security comprised a chattel interest in land, it is beyond argument that the bill of sale is not in the statutory form, and the result is that it is a bad bill of sale. If, on the other hand, the bill of sale only includes personal chattels, it is a good bill of sale.

(5) 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 114; 37 W. R. 353.

(6) 6 Price, 411, 457.

I need hardly say that in considering the document one must do so according to the ordinary rules of construction, and it makes no difference that the document is a bill of sale originally given to a money-lender. I have read the judgment of the LORD CHIEF JUSTICE in the Court below, and it seems to me that in substance his decision is based on the case of *Cochrane v. Entwistle* (2). In that case, however, the schedule to the bill of sale, after enumerating certain personal chattels, expressly went on to include "all the tenant right, valuation, goodwill, tilledges and interest of the mortgagor in and to the farm known as Poulney Lodge Farm." In that case, therefore, there was no doubt that in terms the bill of sale dealt with a chattel interest in land, and it does not, therefore, assist in the decision of the present case at all, because in the present case the whole question is whether on the true construction of this bill of sale there was given as part of the security an interest in land as distinguished from an interest in personal chattels. Now, in considering the true construction of this bill of sale and the schedule thereto, one must look at the whole of the bill of sale and ascertain what was the intention of the grantor and grantee as expressed in the words of the document. Taking all these matters into consideration, the question is whether these parties intended merely to give and take a security on the things included in the schedule as personal chattels, or whether they intended also to include a chattel interest in land. It is said that the intention of this document, having regard to the last-mentioned item in the schedule, was really to give the grantee a charge on the land which he could have enforced in equity. One, therefore, has to ask oneself this question Supposing the grantee of this bill of sale had gone to a Court of Equity, and had asked it by declaration or otherwise by order to deal with this document as creating in equity a charge on the land, can it be said that such an application would have succeeded? Would not the grantor have been entitled to say in answer to such a claim, "Look at the document; look at the wording; it is manifest that my intention, and the intention of the grantee, was not to create any charge upon the land but simply to give a security on the assignment itself and not to charge the land the subject-matter of the assignment." One of the consequences of this document being treated in equity as creating a charge on this land would

have been that the grantee might have asked for an order for sale, but it would have been quite unnecessary for the grantee to get any order for sale, because the document itself contained an express proviso empowering the grantee to sell what was intended to be the subject-matter of the security after the expiration of five days from the date of seizure or taking possession. It seems to me that this is strong evidence to show that the intention was to give a security on the document *qua* document, and not to give a security on the land which was the subject-matter of the document, the whole body of the bill of sale purporting only to deal with goods and chattels, and these goods and chattels being specified in the schedule. An argument was based on the alleged fact that possession was taken of these documents by the grantee, and, it was said, contemporaneously with the execution of the bill of sale; but we have no evidence before us as to the circumstances under which that was done, and it does not seem to me to affect the construction of the document. Of course, if the grantor were in a position to say that the document did not represent the true transaction between the parties, it would be open to consider the fact that the possession of this deed of assignment was taken by the grantee; but no such case has been attempted to be made.

Something has been said as to what inference we ought to draw from the words "and all the muniments of title referred to in the said assignment." As I understand those words, they are only a part of the enumeration of chattels subject to this bill of sale. It was said that we cannot read the bill of sale in this way because deeds savour of realty, and that we ought to read the inclusion of the assignment and the other muniments of title as intended to create a charge on the land. That would be a strong argument if it were a true proposition that it is impossible to sever documents of title from the land the subject-matter of those documents; but the case of *Barton v. Gainer* (1) is, to my mind, an authority showing the contrary. In that case certain railway debentures had been handed over by the testator in his lifetime to the defendant, and the question was whether an action of detinue lay by the personal representative of the testator against the defendant. It was said that no property passed in respect of those debentures, and in the course of the argument Chief Baron Pollock said,

"The owner may by grant sever the title deeds from an estate"; and Mr. Baron MARTIN said, "In Sheppard's Touchstone, p. 242, it is said: 'a man may give or grant his deeds, i.e., the parchment, paper and wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man have an obligation, he may give or grant it away, and so sever the debt and it.'" And in truth and in fact documents are not unfrequently handed over not for the purpose of dealing with the subject-matter of the documents as a matter of property, but for the purpose of giving the donee something to "sit upon"—that is, though he may take no property by the documents, he may sit upon them until his debt has been paid or something else has been done. I only cite *Barton v. Gainer* (1) for the proposition that the owner may separate his deeds from his estate, and may grant those deeds accordingly as documents by way of security; and in such a case the intention of the parties is not that the property should pass, but only the documents, as chattels, and the intention of the parties may appear from the instrument executed by them at the time.

Taking all these matters into consideration, I think that, according to its true construction, this bill of sale was not intended to give a charge upon any interest in the land whatever as part of the security, and that the grantee does not take any equitable charge on the land. I think, therefore, that the appeal must be allowed.

ROMER, L.J.: I am greatly indebted to counsel for their full and able arguments, but for which I might have arrived at what I now think would have been a wrong conclusion. For a long time I was under the impression that the appellant was wrong, and that the view taken in the Divisional Court was right; but on a fuller consideration I have arrived at a different conclusion. The question turns on the construction of the bill of sale. So far as concerns the title deeds mentioned in the schedule, if the effect of the bill of sale is to create a charge on the land, the subject-matter of those title deeds, then the appellant is clearly wrong. If, on the other hand, the effect of the bill of sale is not to create a charge on the land, but only to deal with the title deeds as documents pledged, then the appellant is right; for although title deeds savour of

realty, and are the symbols of the land, so to speak, yet it is quite possible for the owner to sever the title deeds from the land and to deal with them as so many pieces of paper, and pledge them as such, in which case such documents would clearly come within the definition of "personal chattels," contained in the Bills of Sale Act, 1878, s. 4, as "articles capable of complete transfer by delivery," whatever their value might be; though I am far from saying that they would be entirely valueless in the hands of the pledgee, for though in themselves of little or no value they might have a value through the owner of the land wishing to recover them, and being willing to pay a price to get them back.

Now, the question here is, was it intended to give a charge on the land or only to give a charge on documents, not as charging the land, but as creating in the grantee a right to hold these documents for what they are worth—and I do not say that they were not worth something in the hands of the grantee of this bill of sale. Now, seeing that the title deeds savour of realty and are symbols of the land in the hands of the owner, I quite agree that in an ordinary case you might well infer an intention to create a charge on land where deeds are assigned, though the document itself might only refer to the deeds. Take the case where there is no document—the simple case of the owner pledging the title deeds without more. In such a case I should infer that the object was to charge the land; and, further, I have no doubt that if the owner of the land were to retain the deeds, but were to sign a document and hand it over to a person and declare that he held the deeds as security for some advance, and there were nothing more, I should again infer that the object was to charge the land; and similar cases might be given. But after all it is a question of what is to be inferred from the construction of the document and the surrounding circumstances. Now, having made these preliminary observations, I will shortly deal with the bill of sale; and, after all, it is something to be borne in mind that the document is a bill of sale, purporting to be a bill of sale on chattels and things; and if you look at the terms of the witnessing part you find that what is assigned is nothing but "chattels and things specifically described in the schedule"; and when you turn to the schedule you find that all except the last item are personal chattels of an

ordinary character. Then you come to this last item—an assignment by certain persons to the grantor of a certain house, and the muniments of title referred to in that assignment. Now to my mind, under these circumstances, what is there referred to is a document. It is spoken of as an "assignment," coupled with "the muniments of title referred to in the said assignment." The assignment must be a document; and it is a document which follows a whole series of personal chattels in a bill of sale naturally dealing with personal chattels, and they are all described as "chattels and things specifically described in the schedule"; and the matter does not stop there, for the bill of sale contains a power of sale; and when you read the power of sale it is impossible to suppose that what is covered by the power of sale was the land itself. It would clearly be departing from the words of the power of sale if you were to attempt to include in it the land itself. Taking, therefore, this document as a whole, I ask myself, Suppose this bill of sale holder had applied to a Court of Equity and claimed a charge upon the land, would he have succeeded? In my opinion he would have failed. I think the Court would have come to a conclusion on the document as a whole that it was not the intention of the parties, as appearing from this document, that any charge should be created on the land itself. That being so, this appeal appears to me to be right, and ought to be allowed.

COZENS-HARDY, L.J.: There is one point on which I certainly agree with my brethren—namely, in thanking counsel for their able arguments. But I am afraid my agreement ceases with that. I think that the decision of the Divisional Court is right, because the bill of sale includes something which is not a personal chattel. I propose to deal with the point simply as a matter of construction of the bill of sale itself. I doubt if we have any right to look at the other circumstances, though if the title deeds were in fact handed over to the money-lender at the time of the execution of the bill of sale, the true nature of the transaction does not seem to have been disclosed; but I put that on one side, as I do not think that the evidence justifies me in considering it.

Treating it as a question of construction, in the first place, this is

a transaction of loan secured by an assignment of the chattels and things specifically described in the schedule by way of security. There is a power to sell the property comprised in the schedule after a certain number of days from the date of seizure or possession, and amongst other items described in the schedule are the "assignment" of the lease of the leasehold premises known as the "Lion Hotel" to Denton, the grantor of the bill of sale, "and all the muniments of title referred to in the said assignment"—that is, the schedule does not merely deal with the parchment as a curiosity, but it includes every single muniment of title relating to this property, and the grantor thereby gives a licence to the grantee to obtain possession of these title deeds as security for his debt. Now if a man gives in writing an authority to another to go to his bank and take his title deeds as security for a loan, it seems to me that that would be regarded as creating a security on land, and it seems to me to be straining credulity in this case to suppose that the intention of the parties was to treat this assignment and these muniments of title as mere pieces of parchment and wax; and the irresistible inference seems to me to be that they were dealt with in this way for the purpose of giving a security on the leasehold interest of the grantor; and I ask myself this question: After this bill of sale had been given and default had been made, would not the money-lender have been entitled to call for the execution of a legal mortgage or to obtain other relief in equity? Speaking for myself, I think that he would; and if that be the true view, then this bill of sale is bad. In the Court below reliance was placed on *Cochrane v. Entwistle* (2). I agree with Lord Justice VAUGHAN WILLIAMS that that decision does not in any way assist us in the present case. That case was one almost too plain for argument. The present case is one of great difficulty, and has caused me great doubt, because I have the misfortune to differ from the other members of the Court; but, so far as I am concerned, I think the decision appealed from was right and ought to be affirmed.

Appeal allowed.

Solicitors: *J. Carnegie*, for the Appellant.

Sissey & Cook, agents for *Tolhurst, Lovell & Clinch*,
Gravesend, for the Respondents.

HOPKINS v. GUDGEON (GUDGEON, CLAIMANT).

1906, February 27. LORD ALVERSTONE, C.J., RIDLEY AND DARLING, JJ.

Bill of Sale—Registration—Apparent Possession—Bonâ fide Purchase—Execution Creditor—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.

The owner of certain furniture, which was in a house occupied by him, sold it in 1903 to a company by an agreement which was not registered as a bill of sale, and in 1904 the company *bonâ fide* sold it to the original owner's mother by a document which was not registered. The furniture remained in the apparent possession of the original owner till 1905, when it was seized in execution under a judgment obtained against him. His mother having claimed the furniture :—

Held, that as she could not show either a registered title or that she had taken possession so as to render registration unnecessary, the title of the execution creditor must prevail.

APPEAL from the decision of the Judge of the Portsmouth County Court in an interpleader issue, in which the claimant Ann Gudgeon claimed certain furniture which was seized in execution under a judgment against the defendant T. W. Gudgeon.

For some years prior to October, 1903, the defendant carried on the business of a furniture dealer at Ryde, in the Isle of Wight, and in the latter end of 1903 he was in financial difficulties. A company was thereupon formed, the defendant being one of the directors, for the purpose of taking over his business. At this time the defendant lived at the business premises, and certain furniture of his was in the rooms occupied by him for his private use. The company purchased the whole lot of the furniture in the house, including that in private use by the defendant, by agreement which was not registered as a bill of sale. Upon the formation of the company the defendant continued to occupy the same rooms and to use the same furniture in precisely the same way as he had done before the company was formed. The company paid the defendant a salary of 5*l.* per week as manager, and the defendant paid the company 1*l.* per week as the hire of the furniture in his private use.

In May, 1904, the company was in money difficulties, and it was arranged that the claimant should purchase the furniture which the defendant had in his private use for 200*l.*, and the transaction was carried out by two letters dated 1 July and 2 July, 1904, which passed between the company and George Gudgeon, who was acting

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on behalf of the claimant in the transaction, and who on her behalf paid the agreed sum of 200*l.* to the company. Neither of the letters of 1 July or 2 July, nor any other document in the transaction was registered as a bill of sale. The furniture all remained in the defendant's possession on the same premises after the purchase in exactly the same way as before the purchase and before the formation of the company. There was no record in the company's books of the purchase by the claimant.

The defendant continued to live on the company's premises and to remain in possession of the furniture until December, 1904, when he removed to a private house in Southsea, and the furniture was removed by him to that house, where he continued in occupation of it.

In 1904 the defendant was made a bankrupt, and the company at the date of the proceedings in the County Court was in liquidation.

In April, 1905, judgment was signed against the defendant in the action by the plaintiff, and the furniture in question was seized in execution under that judgment in May, 1905.

The County Court Judge disallowed the claim of the claimant, and gave judgment in favour of the execution creditor on the grounds that the furniture remained in the possession of the defendant, both actual and apparent, from the period before the formation of the company continually up to the time of the seizure under the execution in the action; that the evidence of the transaction of the sale to the company by the defendant was contained in the articles of association, which were never registered as a bill of sale; that the evidence of the sale by the company to the claimant was contained in the letters of 1 July and 2 July, which were never registered as a bill of sale; that the transaction was void as against the execution creditor under the Bills of Sale Act, 1878, and also as constituting a fraud upon the creditors of the company.

The claimant appealed.

Grimwood Mears, for the claimant:

Morewood v. South Yorkshire Railway [1858] (1) is an authority in the claimant's favour, as it shows that only the title under the

first unregistered bill of sale is to be considered. The claimant's title is not affected.

[Lord ALVERSTONE, C.J.: In that case the question was as to a fraudulent conveyance. Different considerations may arise where the question is non-registration.]

That case and *Antoniadi v. Smith* [1901] (2) show that, although the claimant's title is derived from a person who had a feasible title, yet if the claimant takes steps to perfect her title, as she in fact did, the transaction cannot be impeached. The transfer from T. W. Gudgeon to the company might have been defeated by T. W. Gudgeon's trustee in bankruptcy or by his creditors, but no such steps were taken to avoid the transaction; and as, when the furniture was removed to Southsea, it was taken out of the apparent possession of the company, the transfer from the company to the claimant cannot be impeached.

English Harrison, K.C. (Cababé with him), for the execution creditor :

The claimant acquired no better title than the company. See *Karet v. Kosher Meat Supply Association* [1877] (3). The company, having regard to the judgment debtors' bankruptcy, had no title to the furniture, and therefore could transfer no title to the claimant. In *Antoniadi v. Smith* (2) the claimant registered her title, and there was not at the time of the second transaction a trustee in bankruptcy entitled to claim the goods: *Cookson v. Swire* [1884] (4).

Lord ALVERSTONE, C.J.: In my opinion the decision of the County Court Judge was right. The facts in this case may be stated in a very few sentences: The goods in question, from 1903 down to the time of the levy of the execution some time in 1905, were throughout in apparent possession, and possibly in the actual possession of the transferor to the company, T. W. Gudgeon. In 1903 he sold his business, including the furniture in question, to the company

(2) 8 *Manson*, 335; [1901] 2 *K. B.* 589; 70 *L. J. K. B.* 869; 85 *L. T.* 200; 49 *W. R.* 693.

(3) 2 *Q. B. D.* 361; 46 *L. J. Q. B.* 548; 36 *L. T.* 694; 25 *W. R.* 691.

(4) 9 *App. Cas.* 653; 54 *L. J. Q. B.* 249; 52 *L. T.* 30; 33 *W. R.* 181.

by a document in the nature of a bill of sale which was not registered ; and if the question had then arisen between the company and the execution creditor of T. W. Gudgeon, the transaction would have been held invalid. In July, 1904, Mrs. Gudgeon *bonâ fide* bought the goods from the company for 200*l.*, which she paid, but there was no document carrying out this transaction registered as a bill of sale. Some time after that the judgment debtor removed to Southsea, and the goods still remained in his apparent possession. Upon these facts the question is, can Mrs. Gudgeon, as a *bonâ fide* purchaser from the company, defeat the title of the execution creditor, there having been no registration of any part of the transaction. I say "any part," because, taking Lord SELBORNE's judgment in *Cookson v. Swire* (4), it might be contended that registration by Mrs. Gudgeon of the transfer from the company to her would be sufficient. I express no opinion whether that would have been so or not. The broad principle upon which I base my judgment is that, as no part of the title is upon the register, and as the goods remained throughout in the possession of the judgment debtor, the claimant's title cannot prevail against that of the execution creditor. In *Cookson v. Swire* (4) the transaction had been perfected by possession. That case shows that where the first bill of sale has become a spent document, the assignee under a second bill of sale need not rely upon the first. The old bill of sale was not necessary to establish the claimant's title. In *Karet v. Kosher Meat Supply Association* (3), it was held to be necessary for a person claiming title to prove a registered bill of sale. *Antoniadi v. Smith* (2) certainly does not affect this case. The decision in that case mainly rested upon the fact that the claimant was in possession, and it was therefore not necessary for her to register the original bill of sale. In *Morewood v. South Yorkshire Railway* (1) there was no question as to registration ; but it was an attempt to impeach an honest transaction, by an antecedent fraudulent transaction, and, as Baron BRAMWELL pointed out, the person claiming was not affected by the fraud.

I am therefore of opinion that where a person sets up within a period of five years, as against a judgment creditor, a title of goods which have been throughout in the possession of the judgment debtor, he must show either a registered title or that

something has been done in the way of taking possession of the goods which renders registration unnecessary. The County Court Judge was right in holding that the transaction with the company was not sufficient to justify Mrs. Gudgeon in claiming this furniture as against the execution creditor.

RIDLEY, J.: I agree.

DARLING, J.: I am of the same opinion.

Appeal dismissed.



IN RE EHRMANN BROTHERS, LIMITED, ALBERT
v. EHRMANN BROTHERS, LIMITED.

1906, July 25, 26. C. A. VAUGHAN WILLIAMS, ROMER, COZENS-HARDY, L.JJ.

Company—Debentures—Registration—Extending Time—Proviso for Protection of Prior Rights—Winding-up—Rights of Unsecured Creditors—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.

Where the time for registration of debentures has been extended by an order under section 15 of the Companies Act, 1900, containing the usual proviso for the protection of rights acquired prior to the date of actual registration, the holders of such debentures are in a winding-up of the company entitled to priority over ordinary unsecured creditors whose debts were in existence at the date of the registration.

The proviso is merely intended to protect rights acquired against or affecting the property of the company which intervene between the expiration of the twenty-one days within which the debentures are required to be registered under section 14 of the Act and the extended time allowed by the order, and does not protect the existing unsecured creditors who have not obtained any security or charge upon the property subject to the debentures.

In re Anglo-Oriental Carpet Manufacturing Co. (1) approved, but distinguished.

In re Johnson & Co. (2) discussed and explained.

Decision of JOYCE, J. (3), reversed.

APPEAL from a decision of JOYCE, J.

The above-named company was incorporated in June, 1900, under the Companies Acts, 1862 to 1893. In July, 1900, the company resolved to raise the sum of 26,250*l.* by the issue of a series of debentures. Certain of these debentures were issued prior to 1 January, 1901, the date upon which the Companies Act, 1900, came into operation. Subsequently certain other debentures of the same series were issued, but through inadvertence they were not registered within twenty-one days after the date of their creation, as required by section 14 of the Companies Act, 1900. By an order dated 24 July, 1903, and made by SWINFEN EADY, J., under section 15 of the Act, the time for registration of these debentures was extended

(1) 10 Manson, 207; [1903] 1 Ch. 914; 72 L. J. Ch. 458; 88 L. T. 391; 51 W. R. 634.

(2) 9 Manson, 307; [1902] 2 Ch. 101; 71 L. J. Ch. 576; 86 L. T. 791; 53 W. R. 482.

(3) *Ante*, p. 256; 75 L. J. Ch. 575.

until 14 August, 1908. The order contained the usual proviso, "but this order is to be without prejudice to the rights, other than the rights in respect of debentures of the series of the said debentures authorised by resolution of the company dated 21 July, 1900, which may have been or may be acquired against the holders of the said debentures set forth in the said schedule prior to the time when the last-mentioned debentures shall be actually registered." The debentures were registered in accordance with the order. On 15 October, 1908, the writ in the above-mentioned action, which was a debenture-holders' action, was issued, and on 6 November, 1908, a receiver and manager was appointed. On 8 November, 1908, the company went into voluntary liquidation. On 18 February, 1904, KEEKIEWICH, J., gave judgment in the action, and directed the usual inquiries, and also an inquiry as to the unsecured creditors at the date of registration of the debentures under the order of 24 July, 1908. The Master found that certain bills since assigned to Gonzalez Byass & Co., Limited, were debts of the company at a date prior to the registration of the debentures under the order, and that they still remained unsatisfied. The assets of the company were wholly insufficient to satisfy both debentures and debts. On further consideration of the debenture-holders' action, JOYCE, J., held that the ordinary unsecured creditors before the date of registration of the debentures in August, 1908, must come in *pari passu* with the holders of such debentures.

The debenture-holders appealed.

Gore-Browne, K.C., and E. Ford (Hughes, K.C., with them), for the appellants :

The order of SWINFEN EADY, J., of 24 July, 1908, extending the time for the registration of the debentures in question was made under section 15 of the Companies Act, 1900, and contained the proviso which is now common form since the order that was settled in *In re Johnson & Co.* [1902] (2). Shortly after the Act came into operation BUCKLEY, J., in *In re Joplin Brewery Co.* [1901] (4), laid down the principle that the analogy of the Bills of Sale Act, 1878,

(4) 8 Manson, 426; [1902] 1 Ch. 79; 71 L. J. Ch. 21; 85 L. T. 411; 50 W. R. 75.

was applicable, and that the rights of creditors that had accrued before the registration of the debentures were preserved. The Court of Appeal in *In re Johnson & Co.* (2), decided that by rights in that case was meant rights that had in some form attached to the property charged by the debentures. An ordinary unsecured creditor who has not taken any proceedings to get a charge or security on the property of the company is not within the proviso, for he has not acquired any right which is taken away from him by the registration. That is the position of the respondents. Instead of registering the debentures in question, the company might have cancelled them and might have issued new debentures which would have taken priority over any unsecured debts then in existence. In *In re Anglo-Oriental Carpet Manufacturing Co.* [1903] (1), BUCKLEY, J., decided that where a winding-up has intervened between the order for registration and the actual registration, the rights of the ordinary creditors do attach against the property of the company because the liquidator holds the property subject to the statutory trust in favour of all the creditors. Under those circumstances rights have accrued, and the words of the proviso apply. JOYCE, J., considered himself bound by what he understood to be BUCKLEY, J.'s opinion in that case, and held, contrary to his own view, that the unsecured creditors existing before the date of registration were entitled to come in and rank *pari passu* with the debentures subsequently registered. In *In re Abrahams and Sons* [1902] (5), an application was made after winding-up proceedings for an order to register debentures, but BUCKLEY, J., held that it would be useless to make any order, because all rights against the property had then accrued, and said that the proviso was in accordance with *Crew v. Cummings* [1888] (6), which decided that under the Bills of Sale Act a creditor who had issued execution acquired an interest in the property that was not affected by any subsequent registration of the bill of sale.

Registration will afford no protection at all to the debenture-holders if the contention on behalf of the unsecured creditors is allowed to prevail.

(5) 9 Manson, 176; [1902] 1 Ch. 695; 71 L. J. Ch. 307; 86 L. T. 290; 50 W. R. 284.

(6) 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886; 36 W. R. 908.

Badcock, K.C., and *Ashton Cross*, for the respondents, Messrs.
Gonzalez Byass & Co., Limited :

Under the Companies Act, 1900, s. 14, an unregistered debenture is to be void as against the liquidator and any creditor of the company. The debenture-holders whose debentures have not been registered come to the Court for an indulgence, and they must pay for that indulgence. They ought not to be allowed to set up their debentures against the respondents. Admittedly the unsecured creditors have no way of enforcing their rights until the winding-up. In order to give effect to the Act the unsecured creditors who are then in existence and who were in existence when the extension order was made ought to be entitled *pari passu* with the debenture-holders who obtained the indulgence. Before granting the indulgence the Court always requires proof that the company is solvent.

The object of the Act, as was pointed out in *In re Anglo-Oriental Carpet Manufacturing Co.* (1), was to prevent the creation of pocket securities—that is to say, securities that could be kept up the sleeve and then used against the unsecured creditors. The appellants are simply producing a pocket security. The order of SWINFEN EADY, J., extending the time for registration was made behind the backs of the general creditors, but it in effect provides that the debenture-holders are not to have any charge on the property in priority to such creditors. The respondents ask the Court to give them the protection of the proviso in that order. Their obvious rights are no doubt in the winding-up, but they might possibly have the right to interfere and prevent the debenture-holders from dealing with the property charged otherwise than subject to the rights of the respondents under the order. Although it cannot be contended that the debentures are void, they are not in the same position as if they had been properly registered in the first instance, and are only good *sub modo*, and do not entitle the appellants to sweep away the whole of the assets from the unsecured creditors. As to the analogy of the Bills of Sale Act, 1878, BUCKLEY, J., in *In re Joplin Brewery Co.* (4), points out that section 15 of the Companies Act, 1900, is a provision of similar import to section 14 of the Bills of Sale Act, 1878, but that the language is wider. In *In re Spiral*

Globe Co. [1901] (7), where, after the commencement of the winding-up of the company, an order was made extending the time for registration, the order was qualified by the words "This order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." In that case SWINFEN EADY, J., said he was unable to accept the view put forward in argument, that the object of section 14 of the Act of 1878 (which was *in pari materia* with section 15) was only to protect the rights of persons in whom any property of the mortgagor had actually vested before the registration of the debentures. Under the Bills of Sale Act, 1878, s. 8, the issuing of execution is necessary in order to protect the general creditor; but the language of section 14 of the Companies Act, 1900, is quite different.

[VAUGHAN WILLIAMS, L.J., referred to *In re Parsons and Furber* [1893] (8).]

The whole object of the Bills of Sale Act is to protect the creditor who has issued execution. The rights, however, of the unsecured creditors under the Act of 1900 are in no way dependent on the issuing of execution. The Act does not require it, and no case decides that it is necessary.

[VAUGHAN WILLIAMS, L.J.: The object of that Act was not to give new rights to creditors, but to compel registration.]

No reply was called for.

VAUGHAN WILLIAMS, L.J.: This is an appeal against the judgment of Mr. Justice JOYCE, which judgment runs thus in the material part: "This Court doth declare that" (subject to costs) "the said funds"—that is, the funds upon which the debentures are charged—"ought to be apportioned amongst the holders of the said debentures in proportion to the amounts certified to be due to them respectively, and that the aggregate of

(7) 9 Manson, 52; [1902] 1 Ch. 396; 71 L. J. Ch. 128; 85 L. T. 778; 50 W. R. 187.

(8) [1893] 2 Q. B. 122; 62 L. J. Q. B. 363; 68 L. T. 777; 41 W. R. 468; 4 Rep. 374.

the amounts certified to be due to those debenture-holders whose debentures were registered pursuant to the order dated 24 July, 1903, in the matter of Ehrmann Brothers, Limited, and the Companies Act, 1900 (in the said judgment mentioned) ought to be apportioned amongst such last mentioned debenture-holders"—those are the debenture-holders who registered under the order extending the time—"and the unsecured creditors of the defendant company prior to the respective dates of registration of the several debentures held by such last-mentioned debenture-holders in proportion to the amounts certified to be due to such last-mentioned debenture-holders and the said unsecured creditors respectively, without prejudice to any question as to the rights of the holders of debentures issued prior to 1901 to rank in respect of any deficiency in their security against the funds apportioned to the debenture-holders whose debentures were registered pursuant to the said order dated 24 July, 1903, and the unsecured creditors of the company above referred to." The appeal is against that part of the order which places the unsecured creditors of the defendant company upon a level with the debenture-holders who registered pursuant to the leave granted under the order dated 24 July, 1903, and it is said that the unsecured creditors ought not to have been put upon a level with those debenture-holders. I think that that contention of the appellants is right.

It is of course necessary to look at the order of 24 July, 1903, because when one looks at sections 14 and 15 of the Companies Act, 1900, after the provision in section 14 for registration within twenty-one days, and the provision for the avoidance of such debentures as are not registered within that time, one finds that in section 15 there is power given for the extension of the twenty-one days. Section 15 says: "A Judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief may, on the application of the company or any person interested, and on such terms and conditions as seem

to the Judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified." That section expressly empowers the Judge, who grants the relief in question by extending the time in which the registration may be made, to do so upon such terms and conditions as seem to the Judge to be just and expedient. Now, looking at the order of 24 July, 1903, one finds the words, "But this order is to be without prejudice to the rights other than the rights in respect of debentures of the series of the said debentures authorised by resolution of the company dated 21 July, 1900, which may have been or may be acquired against the holders of the said debentures set forth in the said schedule prior to the time when the last-mentioned debentures shall be actually registered." That order having been made, the debenture-holders who thus obtained the benefit of the order in fact registered the debentures subsequently, and it is not denied that the effect of that registration is that the debentures are no longer void, but, being debentures registered within the extended time, are good debentures. But it is said that that is subject to the rights of the persons who were existing unsecured creditors at the time when this order was made. The words that one has to look at are the words "without prejudice to the rights which may have been or may be acquired against the holders of the said debentures"—that is, the debentures which are allowed to be registered out of time—"set forth in the schedule." Now, in my judgment, the unsecured creditors who have acquired no rights of property as against the property which is the subject of the debentures do not come within those words. I believe that those words are merely intended to protect intervening rights—rights which intervene between the end of the twenty-one days within which the statute requires registration and the time of registration under the order for extension of the time. One sees, of course, that, if there is an order for extension of time, and before the registration actually takes place there intervenes a winding-up of the company, these words would protect the rights of property so acquired in that interval. But it may also be that, besides the acquisition of rights of property in this way, other rights of property had been acquired by contract or otherwise. I say nothing about such rights of property being excluded from the

benefit of this protection. All that I say is that, according to my reading of the order, the protection is given only to those who have acquired rights of property or rights against property; and this, as it seems to me, clearly does not include unsecured creditors, who have no right against the property in question and no charge against it. I am now merely dealing with the construction of this particular order.

The question is not entirely devoid of authority. First there was the decision of Mr. Justice BUCKLEY in *In re Joplin Brewery Co.* (4), in which he adopted the form of order which had been adopted in respect of the extension of the time for registration of bills of sale. Subsequently to that decision the matter came before the Court of Appeal, consisting of the MASTER OF THE ROLLS, Lord Justice STIRLING, and Lord Justice COZENS-HARDY, in the case of *In re Johnson & Co.* (2), and the question there was not what was the protection afforded to unsecured creditors, but what was the effect of an order drawn up in accordance with Mr. Justice BUCKLEY's decision in *In re Joplin Brewery Co.* (4), upon the rights of debenture-holders *inter se*. The Court in that case had not to decide the question of the rights of unsecured creditors, although I should gather rather from the judgments of the learned Lords Justices who were parties to that decision that they would not have affirmed that unsecured creditors who have no rights of property at all, and no interest by way of charge or otherwise in the fund of the debenture-holders would have been protected by an order in the form settled in that case. The Court of Appeal made an order which is set out at the end of the report of the case of *In re Johnson & Co.* (2), and as far as it is material it runs thus: "And in lieu thereof,"—the earlier orders were simply in the *In re Joplin Brewery Co.* (4) form—"this Court being satisfied that the omission to register the several debentures of the appellant company set forth in the schedule to this order within the time required by the Companies Act, 1900, was accidental, doth pursuant to section 15 of the said Act, order that the time for registration of the said debentures be extended until 18 May, 1902, inclusive: Provided always that this order is to be without prejudice to any rights (other than rights in respect of debentures of the said series) which may have been or may be acquired against the holders of the said debentures set forth in the

schedule to this order prior to the time when the last-mentioned debentures shall be actually registered. And it is hereby declared that, except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality among themselves attached to all the debentures of the said series, but so that in the event of the debentures set forth in the said schedule being avoided as against parties having any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series other than the holders of the debentures set forth in the said schedule shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance." It will be seen that that order does not specifically deal with the question of law, how far the words of protection in the proviso in the order would give the unsecured creditors a right to come in *pari passu* with the debenture-holders whose debentures were not registered within the twenty-one days, but were registered pursuant to an order by way of relief and within the time mentioned in that order. We have now to decide that question, and although the order in that case does not in terms deal with that question, it does seem to me that some light is thrown upon the question by the passage at the end of the judgment of Lord Justice COZENS-HARDY, in which he says, "The analogy of the Bills of Sale Act which BUCKLEY, J., took in *In re Joplin Brewery Co.* (4), seems to me to be very close and precise; but speaking for myself, I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who have not taken some proceedings to get a charge or a security upon the goods." Of course that does not mean only creditors who have individually done so, but creditors who come within the operation and benefit of an order for winding up giving the creditors a right to have such property administered for their benefit.

That is the conclusion to which I have come in this case. I think that the intention of the Legislature, as appears by the statute itself, was, in a case where the omission to register was accidental, and the extension of time was a just thing to grant, to place the debenture-holders in the same position as they would

have been if they had registered in due time. But of course the Legislature had to make provision for the rights of those persons who had obtained rights which had existed at the time when the order for the extension of time was made. I do not think that the Legislature meant by that that an unsecured creditor, merely because he was an unsecured creditor at the time when the extension order was made, should be allowed to say "So far as I am concerned, that debenture which was not registered in due time, but which was registered under the order for extension, is a void debenture." In fact it is not really contended that he can say so. Counsel for the respondents admitted most frankly that in a case at all events where in fact registration is effected under the extension order, before a winding-up occurs, it is impossible to say that the debenture is void. They only say, "Although it is not void the extension order estops the persons registering under it from saying, as against an unsecured creditor, that this debenture is not void but is an effective security which still continues against him." I think that is not the right view, and therefore I think that the order of Mr. Justice Joyce must be amended as follows: Strike out so much of it as puts the unsecured creditors who have not got any security upon the property in question on a level with the debenture-holders registering under the extension order.

I think, therefore, that this appeal must be allowed with costs.

ROMER, L.J.: I am of the same opinion. Section 14 of the Companies Act, 1900, provides that debentures or any mortgage or charge not filed with the Registrar within the twenty-one days therein mentioned shall be void as against the liquidator or any creditor of the company. The Act does not, however, avoid the mortgage or charge absolutely, but only so far as any security is given thereby upon the company's property or undertaking. The effect, therefore, is that if a mortgage or charge is not registered it is valid as an admission of a debt, but as against a creditor or the liquidator it could not be contended that a valid charge was effected thereby. Section 15 of the same Act provides for an extension of time within which the registration may be effected in certain given cases, and from the wording of that section it will be seen how carefully the Legislature has provided for the extension of time

only being granted in what I may call fit and proper cases, as, for example, where the omission to register was due to inadvertence or some other sufficient cause, or was not of a nature to prejudice the position of creditors or shareholders of the company, or was such that on other grounds it was just and equitable to grant relief. In such cases power is given to the Court to extend the time, and, of course, if time is extended and registration takes place within the extended time, the debentures would be constituted a valid charge *ab initio* subject only to such conditions as might be imposed by a Judge giving the extended time.

When one considers the circumstances under which the Court has power to grant an extension, one would, I think, naturally expect that the kind of condition the Court would impose would be one to protect any rights that might have been acquired against the property charged in the interval before the debentures are actually registered, and accordingly one finds that a form has been settled as to the kind of condition which the Court usually imposes in cases of extension of time. The condition in the present case followed the usual form, and provided that the order was to be without prejudice to the rights which might have been or might be acquired against the holders of the debentures before actual registration. Now, in my opinion the true object of that condition is that it was only intended to protect rights acquired against or affecting the property charged by the debentures. To my mind that condition did not mean that after registration the debenture was to have no effect whatever as a charge against all creditors then existing. It appears to me that the very object of the extension of time being granted was to prevent its being said that the debentures were void generally as a charge. After the registration within the extended time it could not have been validly contended that the debentures were to be treated as void as charges generally. I think that they were intended to be treated as valid charges, subject only, as I have said, to rights acquired which could have been enforced in some way against the property had not the extension of time been granted. The word "right," used in the order, means something affecting the debenture-holders as security-holders, and something which the Court could recognise and enforce, and it cannot mean something—if I may so call it—in the air, some claim or contention which

the Court could not recognise or give effect to in any valid proceedings. Now in the absence of liquidation before the date of registration or of some charge acquired by a creditor, no ordinary creditor had a right which could have been enforced by him as against the debenture-holders, if the debenture-holders sought to get payment of their charge. The general avoidance of the debentures as charges as against the ordinary creditor prior to liquidation proceedings, and in the absence of any charge acquired by him, would not entitle him to intervene as between the company and the debenture-holders, if the company chose to pay the debenture-holders, or to apply any of its property in payment of those debenture-holders, or to give other security to the debenture-holders; nor in my opinion could such a creditor apply or intervene in an action brought by the debenture-holders against the company to enforce their alleged security, if the company chose to recognise the charge and to use its assets in paying those debentures off. An ordinary creditor would have no *locus standi*. If there was a liquidation, of course different considerations would apply, and if he had a charge different considerations would apply. He might then intervene, and I think his intervention would be accepted by the Court. But, as I have said, in the absence of a liquidation, or of anything in the nature of a charge acquired upon the property comprised in the debentures, a creditor could not intervene as against any property of the company or as against the debenture-holders in any way whatever. That being so, it appears to me, as I have said, that the only right protected is one which affects the property covered by the debentures.

That disposes of this appeal. I would only add that in my opinion the decision of Mr. Justice BUCKLEY in the case of *In re Anglo-Oriental Carpet Manufacturing Co.* (1) was right. In that case the company had gone into liquidation prior to the registration, and a right had consequently been acquired by the creditors which the Court recognised and put in force through the liquidator, saying that all the assets then existing of the company not charged must be applied rateably amongst the then existing creditors. On that ground it appears to me that the decision of Mr. Justice BUCKLEY was quite right; but for the reasons I have given that decision in no way, to my mind, justifies the order that was made in this case;

and therefore, in my opinion, Mr. Justice Joyce was wrong in thinking that there was any authority which prevented him from giving effect to what I gather was his own view as to the effect of the condition in question.

COZENS-HARDY, L.J.: I am of the same opinion. Like my brother ROMER, I have the satisfaction of feeling that, in reversing Mr. Justice Joyce's judgment, we are really giving effect to that which was his own independent view, although he thought himself bound by two or three decisions of Mr. Justice BUCKLEY which do not seem to me to bear the construction which he put upon them.

Now the whole question, in my view, depends entirely upon the operation and effect of two or three words inserted in what is now the common form order made by all branches of the Court on applications under section 15 of the Companies Act, 1900. The question is this: What is the meaning of the words "rights which may have been or may be acquired against the holders of debentures"? In my opinion they must mean rights acquired against the property of the company or affecting the property of the company intervening between expiration of the twenty-one days and the extended time allowed by the order. In no other case, it seems to me, can the word "rights" be accurately and properly used. My baker or my butcher cannot be said to have in any proper sense, at the time when the debt is incurred, any right against my property, although if they hereafter sue me and issue execution, or take other proceedings, they will then acquire a right against my property. There must, it seems to me, be some intervening definite act either by the individual creditor or by means of some proceedings taken on behalf of the creditors as a body in order to justify those words "rights acquired."

Now is there any authority against that view? In my judgment there is not. The first case, and the case which gave rise to the form in use, was the case of *In re Joplin Brewery Co.* (4). Mr. Justice BUCKLEY there avowedly followed the analogy of the Bills of Sale Act. He inserted words, which I think, for all material purposes are identical with those which have been inserted for many years past in orders made in the King's Bench Division enlarging the time for registration of bills of sale. The effect of

those words has been clearly interpreted by decisions of the Court, the last of which, I think, was *In re Parsons, Ex parte Furber* (8). If that analogy is right, it follows that the only rights protected are those which attach to and affect the property which otherwise would be bound by and affected by the debenture. It is true there are some words in Mr. Justice BUCKLEY's judgment which might admit of a wider interpretation of the words in question, but according to the fair reading of his judgment I do not think that is the true result. Then there are two subsequent decisions of Mr. Justice BUCKLEY in *In re Abrahams and Sons* (5) and in *In re Anglo-Oriental Carpet Manufacturing Co.* (1). In those cases there had been a winding-up of the company, and in one instance—I think in the case of *In re Abrahams and Sons* (5)—it was before the application to enlarge the time, and in the other case it was after the order extending the time had been made, but before the debentures were actually registered; and in both cases the learned Judge held, and in my opinion rightly, that rights had been acquired by the creditors, not by an individual creditor, but by virtue of proceedings taken which involved the administration of the assets of the company for the benefit of all creditors. The decision in *In re Spiral Globe, Limited, Watson v. Spiral Globe, Limited* [1902] (9), is exactly on the same lines, and it seems to me to be perfectly right.

The only other decision to which our attention has been called is the case in this Court of *In re Johnson & Co.* (2). It is quite true that the point which now arises for decision did not arise there, and could not arise. The company was an extremely solvent company, and the only question was as to the rights *inter se* of certain debenture-holders who did not require the aid of the Court and certain other debenture-holders who did require such aid by enlarging the time for registration. Observations were made in that case by me purely by way of *dictum*, but as those observations have been referred to by Lord Justice VAUGHAN WILLIAMS, and as the matter now arises for decision, I desire to say that I see no reason to qualify what I there said. I only desire to add that I did not intend to limit my observations to the case of an individual creditor taking proceedings for his own protection; but that I intended those observations to apply equally to any proceedings

(9) [1902] 2 Ch. 209; 71 L. J. Ch. 538; 86 L. T. 499.

taken, the effect of which was to involve administration for the benefit of all the creditors of the company. It seems to me that this appeal ought to be allowed.

Appeal allowed.

Solicitors : *Harris, Chetham & Cohen*, for the Appellants.

Tamplin, Tayler & Joseph, for the Respondents.

IN RE CARDIFF WORKMEN'S COTTAGE CO.

1906, August 9, 10. BUCKLEY, J.

Company—Debentures—Omission to Register—Application to Extend Time—Form of Order—Terms—“Just and expedient”—Protection of Unsecured Creditors—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.

Debentures of a company, issued in 1905, were not registered within the time limited by section 14 of the Companies Act, 1900. The omission to register them was due to inadvertence, and the financial position of the company was sound. On an application under section 15 of the Act of 1900 for an order extending the time for registration :—

Held, that in the circumstances of the case an order might be made on the terms imposed in *In re Johnson & Co.* (1), without inserting any words for the protection of unsecured creditors, although it had been decided in *In re Ehrmann Bros., Limited* (2), that that form of order does not protect unsecured creditors; but that in a case of sufficient magnitude it might be well to give notice to unsecured creditors of substantial amount so as to give them an opportunity of being heard on the question of what is “just and expedient” in their interest.

MOTION by the company for an order under section 15 of the Companies Act, 1900 (3), extending the time for registration of

(1) 9 Manson, 307; [1902] 2 Ch. 101; 71 L. J. Ch. 576; 86 L. T. 791; 50 W. R. 482.

(2) *Ante*, p. 368; [1906] 2 Ch. 697; 75 L. J. Ch. 817.

(3) Companies Act, 1900, s. 14, sub-s. 1: “Every mortgage or charge created by a company after the commencement of this Act and being either—(a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the company; or (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company, shall, so far as any security on the company’s property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money

debentures which had not been registered in accordance with section 14 of the Act.

The debentures were issued in February, 1905, by way of renewal of debentures which had previously been issued before the commencement of the Companies Act, 1900, under a resolution passed in December, 1897. The sum secured by them was 4,000*l.* It appeared from the evidence that the omission to register the debentures was due to inadvertence, and that the financial position of the company was sound, and that no creditor was suing or threatening to sue the company.

A. Adams, for the company, asked for an order in the terms of that made in *In re Joplin Brewery Co.* [1901] (4), as modified in *In re Johnson & Co.* [1902] (1).

[BUCKLEY, J.: The Court of Appeal has decided in *In re Ehrmann Brothers, Limited, Albert v. Ehrmann Brothers, Limited* [1906] (2), that that form of order does not protect unsecured creditors.]

The order ought to be made in that form, which is now the settled one.

[BUCKLEY, J.: Is it not just to insert words protecting unsecured creditors who may have given credit in the belief that no debentures existed, because none were registered ?]

The whole requirement of registration of debentures and all the rights of other creditors against them rest on section 14 of the Act of 1900. Section 15 of the same Act allows debentures to be

thereby secured." . . . Section 15: "A Judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the

company, or that on other grounds it is just and equitable to grant relief may, on the application of the company or any person interested, and on such terms and conditions as seem to the Judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified."

(4) 8 Manson, 426; [1902] 1 Ch. 79; 71 L. J. Ch. 21; 85 L. T. 411; 50 W. R. 75.

registered although the time limited by section 14 has expired ; and there is no injustice to creditors if the company avails itself of that qualification of section 14, since all the creditors' rights are conferred by the statute.

Cur. adv. vult.

August 10.

BUCKLEY, J.: This is an application under section 15 of the Companies Act, 1900, to extend the time for registration of certain debentures. The recent decision of the Court of Appeal in *In re Ehrmann Brothers, Limited* (2), renders it necessary to determine a point which is new as matter of decision, although I am not without assistance by way of *dictum*. In *In re Joplin Brewery Co.* (4) I thought it right that orders under this section should contain words expressing the order to be without prejudice to the rights of parties acquired prior to the time when the debentures are actually registered. In *In re Johnson & Co.* (1) the Court of Appeal had to consider and determine what words of qualification it was necessary to add for the purpose of giving effect to contractual rights contained in debentures which, under the terms of issue, were all to rank *pari passu*. They adopted the words "rights acquired" which I had used in *In re Joplin Brewery Co.* (4), and qualified them by words so expressed as to give effect to the contractual right in the debentures to rank *pari passu, inter se*. In *In re Ehrmann Brothers, Limited* (2), the question for decision was what were the "rights" which under that form of words were protected and preserved. It was held that they were only rights acquired against property ; that the words did not protect unsecured creditors who had obtained no charge upon property. In *In re Johnson & Co.* (1) the MASTER OF THE ROLLS had said that "it is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected and who ought to displace the rights of those who were not registered until after his debt had accrued." And, later, that "it is not necessary for the Court to decide any point about creditors, whether execution creditors or others." The Court therefore, left open for future decision the question whether unsecured creditors ought to be protected. I have now to decide that point. In *In re Ehrmann Brothers, Limited* (2), the question argued and decided was not what were the proper terms

to impose, but what was the legal effect of the terms which had been imposed. The Court there decided that the words in *In re Joplin Brewery Co.* (4), and in *In re Johnson & Co.* (1), do not protect unsecured creditors.

In these circumstances I have to consider whether they ought to be protected, whether I ought to insert words such as the following : "Provided always that the security conferred by the debentures for the registration of which the time is extended shall not, as against any creditor of the company who shall have become a creditor after the date when those debentures ought to have been registered, and before the time when they shall actually be registered, be of any greater validity than if this order had not been made." Neither in *Crew v. Cummings* [1888] (5), nor in *In re Johnson & Co.* (1), nor in *In re Ehrmann Brothers, Limited* (2), did this question arise for decision. By way of *dictum*, however, I think that there are indications that serve as some guide. Looking at the matter upon principle, I have to see, in the language of section 15, what terms and conditions seem to me "just and expedient" as terms to be imposed in an order extending the time for registration. The debentures in the present case were issued in February, 1905. Let me assume that persons became creditors of the company subsequent to that date whose debts are still unpaid. If before giving credit they had looked at the register kept under section 14 they would not have found these debentures there. They may have given credit on the faith that they did not exist. At the present moment the holders of these unregistered debentures have as against these creditors no security. The statute makes the security void as against them. The purpose of the Act of Parliament in requiring within twenty-one days registration of securities on the company's property is to ensure the means of notice to those who contemplate giving credit to the company. These creditors of date subsequent to February, 1905, are entitled to say that they gave credit upon the footing that these debentures did not exist, inasmuch as they were not registered ; that the statute makes the debentures void as against them ; and if they were here (which, unfortunately, they are not) they might argue that justice requires that the *status quo* should, so far as they are concerned, be maintained. Upon the

(5) 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886; 36 W. R. 908.

first consideration of the matter this might seem right; but the answer to it is, I think, as follows: If the company now cancelled these unregistered debentures it could issue to their late holders new debentures and register them within twenty-one days; and those debentures would be valid subject to attack (if attack could be successfully made upon them) upon the ground of fraudulent preference. The person who is at any moment an unsecured creditor of the company is always exposed to the danger that the company may execute in favour of other creditors encumbrances upon its property; and unless he can attack those securities on the ground of fraudulent preference they prevail as against him. So long as the company is a going concern the creditor who has obtained no charge upon property necessarily runs the risk of dispositions made by the company by sale, mortgage, or otherwise.

I am conscious that this view renders the section of the Act of 1900, which requires registration of encumbrances, of much less value. I incline to the opinion that when a case of sufficient magnitude arises it may be well to give notice to some of the unsecured creditors of substantial amount so as to give them an opportunity of being heard, if they so desire, upon the question of what is "just and expedient" in their interest. I can anticipate a contention that it might be just, say, to require the order to be advertised and its operation suspended for a certain time in order to enable unsecured creditors to come in and ask for payment or security before validity is given to the void debentures, or to ask for terms similar to those found in section 1, sub-section 2 (b), of the Companies (Memorandum of Association) Act, 1890. And I can foresee a possible answer to that contention. Looking at the affidavit in the present case, I do not think it necessary to take that course in the present instance. In the circumstances of this case I think that I may, without inserting for the protection of the unsecured creditors any words such as above suggested, make the order upon the terms imposed in *In re, Johnson & Co.* (1), notwithstanding the fact that it has been decided that that form of order does not protect the unsecured creditors. I make the order accordingly.

Solicitors: *Radcliffe, Cator & Hood*, agents for *Shirley & Sons*,
Cardiff.

IN RE ENGLISH AND COLONIAL PRODUCE CO.,
LIMITED.

1906, May 30. BUCKLEY, J.

June 28. C. A. VAUGHAN WILLIAMS, ROMER, AND FLETCHER
MOULTON, L.JJ.

Company—Solicitors—Work done before Formation of Company—Adoption of Work by Company—Fees on Registration—Liability of Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 17.

A company is under no liability in equity to pay for work done before its formation merely because it has adopted and derived benefit from such work.

Where, therefore, solicitors have done work in connection with the formation of a company which is subsequently incorporated, they must, in order to recover their costs of such work from the company, establish a legal claim against the company either on their own behalf or on behalf of some person in whose shoes they are entitled to stand.

Per BUCKLEY, J.: They can, however, recover the fees paid by them on the registration of the company, inasmuch as the company is under a statutory liability to pay the same.

In re Hereford and South Wales Waggon and Engineering Co. (1) explained and dictum discussed.

THE English and Colonial Produce Co. (hereinafter called the Produce Co.) was formed to take over the business of a company (hereinafter called the Forage Co.), and also the business of a firm of Meyer & Porritt. The Forage Co. went into voluntary liquidation before the formation of the Produce Co. On 9 November, 1901, the Produce Co. was incorporated under the Companies Acts, 1862 to 1900. Article 109 of the articles of association provided that the company was to be managed by the directors, and empowered them to pay all such expenses of and preliminary and incidental to the formation, establishment, and registration of the company as they might think fit. In July, 1902, the Produce Co. was ordered to be wound up, and in the winding-up proceedings a certain bill of costs was lodged by the firm of Messrs. Dyson, Smith & Marchant, solicitors, who had acted in connection with the formation of the Produce Co. The following items appeared in the bill of costs: 160*l.* for preparing and having executed the memorandum and articles of association of the Produce Co. and doing other things necessary to enable the company to commence business; 16*l.* 10*s.* for counsel's fees for settling the documents; 2*l.* 2*s.* for drawing and approving

(1) 2 Ch. D. 621, 624; 45 L. J. Ch. 461, 463; 35 L. T. 40; 24 W. R. 953.

form of certificate and instructing printer to print same; 4*l.* 10*s.* for printer's charges; and 38*l.* 12*s.* 6*d.* for fees on registration of the company, amounting in all to 216*l.* 14*s.* 6*d.*

On taxation the Registrar disallowed the whole of the items on the ground that the solicitors had been instructed to do the work in connection with the formation of the Produce Co. by four gentlemen—Messrs. Church, Sutton, Porritt, and Meyer—who afterwards joined the board of directors of the Produce Co.; and that the Produce Co., although they had power to do so, had never passed any resolution authorising the payment of these costs. The solicitors took out a summons against the liquidator of the Produce Co. to review the taxation.

Gore-Browne, K.C., and R. J. Drake, for the solicitors.

A. W. Groser, for the liquidator of the Produce Co.

BUCKLEY, J.: I have to review the taxation by the Registrar in Companies Winding-up of a bill of costs in respect of certain items amounting in the aggregate to 216*l.* 14*s.* 6*d.*, which have been disallowed by him.

I will deal first with two items of 160*l.* and 16*l.* 10*s.*, which are, shortly stated, for work relating to the intention to form a company, and to the preparation of its memorandum and articles of association. As appears by the bill, there were attendances on Messrs. Church, Sutton, Porritt, and Meyer as to forming a new company to take over the business of the Forage Co. and of Messrs. Meyer & Porritt, and instructions were given for the memorandum and articles for the incorporation of the new company. The persons giving these instructions were *prima facie* the persons I have named. The solicitors in their objection to the taxation stated that the Forage Co., prior to going into voluntary liquidation, originally instructed the solicitors to do what was requisite to form the Produce Co., to acquire the assets; and that, in pursuance of such instructions, they did all things necessary before the resolution for the voluntary winding-up of the Forage Co. was passed. The first entry in the minute book of the Produce Co. is the minute of a meeting on 2 November, 1901, of the four persons mentioned in the bill of costs and a Mr. Sternberg, and

at that meeting the memorandum and articles of association were read and signed, and it was resolved "that the solicitors of the company be instructed to forthwith register the company." The Produce Co. was incorporated on 9 November, 1901, and its memorandum and articles were then filed with the Registrar of Joint Stock Companies. Therefore the liability for any work done by the solicitors had already been incurred before the incorporation of the Produce Co. Under these circumstances the question arises : Who retained the solicitors ; and did they do the work intending to look to the Produce Co. when incorporated for payment for that work, or to the gentlemen I have mentioned ? The Registrar finds as a fact, and in my judgment rightly, that these gentlemen retained the solicitors. The Produce Co. after it was incorporated took the benefit of the work done by the solicitors. Is the company rendered liable by that fact to pay for the work done ? The doctrine which is applicable is to be found in the judgment of Lord Justice FRY in *In re Rotherham Alum and Chemical Co.* [1883] (2). The Lord Justice says : "The appellant rests his case on two grounds. One is that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it. As pointed out by Lord Justice LINDLEY, that is by no means universally true. It is not true where the work was done for the vendor of the property, and that was the case here, these costs having been incurred on the retainer of Mycock." That statement, *mutatis mutandis*, applies here, and I hold that the case is governed by *In re Rotherham Alum and Chemical Co.* (2), and that the company was not liable for the costs incurred in respect of the promotion.

The fee of 33*l.* 12*s.* 6*d.* paid by the solicitors to the Registrar of Joint Stock Companies on registering the company stands upon a different footing. By section 17 of the Companies Act, 1862, the memorandum and articles are to be delivered to the Registrar of Joint Stock Companies, and "there shall be paid to the Registrar by a company having a capital divided into shares"—and the Produce Co. was such a company—certain fees. Under that section and a subsequent Act of Parliament the company became liable to pay the fees on its registration, amounting, to 33*l.* 12*s.* 6*d.* The

(2) 25 Ch. D. 103, 111; 53 L. J. Ch. 290, 291; 50 L. T. 219; 31 W. R. 131.

solicitors paid that sum, which the company was under a statutory liability to pay the revenue authorities, and the solicitors were, in my judgment, entitled to charge the company in respect of this item.

As to the other items which the Registrar has disallowed, it was for the solicitors to make out that they were entitled to make the charges, and they have failed to do so. In respect of the first item—the charge of 160*l.*—the solicitors had craved in aid clause 109 of the articles of association. But that clause is really inconsistent with the suggestion that the company was liable for all the expenses of the formation, establishment, and registration of the company. The result is that the certificate of the Registrar is varied to this extent: that the fee of 89*l.* 12*s.* 6*d.* is allowed, but his decision as to the other items is affirmed, and I make no order as to costs.

The solicitors appealed, and asked that the certificate might be further varied by allowing the whole of the items. It appeared that the Produce Co. had actually paid the solicitors 100*l.* on account of the costs in question.

Gore-Browne, K.C., and R. J. Drake, for the appellants:

The solicitors are entitled to their costs in connection with the formation of the Produce Co. They cannot invoke the doctrine of agency because there was no principal in existence at the time the work was done by them; nor can they set up a contract by means of the articles of association of the company, and consequently the company could not be sued at law. They do, however, rely on the doctrine of the Court of equity that where a company adopts and derives benefit from work done before the formation of the company it is bound in equity to pay for such work unless it is otherwise paid for: *In re Hereford and South Wales Waggon and Engineering Co.* [1876] (1), per MELLISH, L.J.

That case has found its way into the text-books as an authority for the proposition on which we rely.

In *In re Empress Engineering Co.* [1880] (3) there was another person liable to pay, and the proposition in question was recognised, but the point was left open.

. (3) 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342.

Again, in *In re Rotherham Alum and Chemical Co.* (2) the company was held not liable; but in that case also there was the liability of a third person on whose retainer the work had been done.

[They referred to Buckley on the Companies Acts (8th ed.), p. 557, note to article 55, Table A.]

Stewart-Smith, K.C., and *A. W. Groser*, for the respondent,
the liquidator of the Produce Co.

The COURT was of opinion that the appellants must look for their fees in connection with the formation of the Produce Co. to the persons who instructed them to do the work, and that the Produce Co. were not liable in respect of any items the subject-matter of the appeal, but that the appellants were entitled to appropriate, in respect of such items, the 100*l.* paid to them by the company. The taxation was referred back to the Registrar to review on this footing, and no order was made as to costs.

VAUGHAN WILLIAMS, L.J.: I wish to say one word about the proposition which was put forward by counsel for the appellants, and for which they cited a passage from the judgment of Lord Justice MELLISH in *In re Hereford and South Wales Waggon and Engineering Co.* (1). Lord Justice MELLISH was delivering the judgment of the Court of Appeal, consisting of himself, Lord Justice JAMES, and Lord Justice BAGGALLAY. It is said that that case is an authority for the proposition that if expenses are incurred before the formation of a company which afterwards comes into existence, and the company takes the benefit of the work in respect of which the expenses arose, although the company could not be sued at law for those expenses, inasmuch as it was not in existence at the time when the expenses were incurred, and was therefore unable to authorise agents to act for it, and ratification was impossible, yet it was under some liability in equity. Lord Justice MELLISH says, "We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them." Those words do look as if they would cover the proposition that the adopting and taking the benefit of the services by the new company would make

the company liable in equity under contracts made before it came into existence. I do not, however, think that that is the right way to look at the judgment in that case. It was a case in which, even supposing there was authority for asserting such a liability against the company, there was, by reason of the fraudulent concealment of the claimants, a complete answer to the claim based on that liability. I think that all the Court did in that case was, not to decide that there was such a liability in equity, there being no liability in law, but merely to say that even on that assumption there was no liability under the circumstances of that case. Still I recognise that that case has been cited several times since as an authority for the proposition I have mentioned. But it cannot be said that that proposition has ever been affirmed in the subsequent cases on this branch of the law. The *dictum* has been explained and not applied in the subsequent cases, and the explanation in each case is a different one. If the cases of *In re The Empress Engineering Co.* (3) and *In re Rotherham Alum and Chemical Co.* (2) are looked at, it will be seen that, though the argument which has been addressed to us here was advanced in each of those cases, it was not adopted by the Court. In these circumstances I think we are all prepared to hold that there is no binding authority for the proposition that a company, because it has taken the benefit of work done under a contract entered into before the formation of the company, can be liable in equity under that contract. On the contrary, it seems to me that the authorities are the other way.

Perhaps it is sufficient for me to say this, because on the facts of the present case we have not to decide the question of the effect of the judgment in *In re Hereford and South Wales Waggon and Engineering Co.* (1). But it was so pressed upon us that this case was cited in the text-books as an authority for the proposition in question that I thought it right to say, although it is merely an *obiter* expression of opinion, that I do not myself think that case is any authority for that proposition.

ROMER, L.J.: I also think it right to state my views on this point. In my opinion, with respect to a solicitor's claim for work done by him in relation to the formation of a company which is subsequently formed, in order to substantiate a claim against the

new company for his costs as solicitor he must establish a legal claim against the company either on his own behalf or on behalf of some person or persons in whose shoes he is entitled to stand. If he cannot do that, he cannot succeed, in my opinion, in establishing a claim on what are called equitable grounds. The idea that a company, merely because it has obtained the advantage of the solicitor's work done before the formation of the company, is liable in equity for the costs of that work, appears to me to be untenable. In my opinion there is no such equity, and any claim based upon it ought to fail.

FLETCHER MOULTON, L.J.: I am satisfied that no point of law comes to us for decision in this case, and I reserve my decision as to the liability of a company in respect of the necessary costs of the legal steps in the course of its formation. I quite agree that there is no binding decision that the company is liable to pay such costs. But I wish to say that I also agree with my brothers in thinking that there is no broad equitable principle that, because you have got the benefit of a man's work, therefore you are liable to pay for it. Stated so broadly, that proposition, in my opinion, is absolutely incapable of support.

Solicitors: *Dyson, Smith & Marchant; S. J. R. Stammers.*

DE BEERS CONSOLIDATED MINES, LIMITED *v.*
HOWE (SURVEYOR OF TAXES (1)).

1906, June 18, 19; July 30. H. L.

Company — Incorporation and Registration Abroad — Income Tax — "Person residing in the United Kingdom" — "Trade exercised within the United Kingdom" — Head Office Abroad — General Meetings Abroad — Office in England — Directors' Meetings in England and Abroad — Control and Management in England — Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Schedule D.

A foreign company may be a "person residing in the United Kingdom" within the meaning of section 2, Schedule D, Income Tax Act, 1853, notwithstanding that its head office is situated abroad and its general meetings are held abroad. A company incorporated and registered abroad, which has an office in London and directors living in the United Kingdom, is resident here within the meaning of the Income Tax Act, 1853, s. 2, Schedule D, and liable to income tax in this country.

Decision of the Court of Appeal (2) affirmed.

APPEAL from an order of the Court of Appeal (COLLINS, M.R., MATHEW, L.J., and COZENS-HARDY, L.J.) dismissing an appeal against an order made by PHILLIMORE, J., upon a case stated for the opinion of the Court pursuant to section 59 of the Taxes Management Act, 1880, by the Commissioners for the general purposes of the Income Tax Acts for the City of London.

At a meeting of the Commissioners, held on 31 July, 1902, the appeal of the company was heard against a supplementary assessment made upon them for the year ending 5 April, 1901, in the sum of 1,557,698*l.*, and against an additional assessment for the year ending 5 April, 1902, in a similar sum, in respect of the profits of the company in the United Kingdom and elsewhere. The Commissioners confirmed the assessments; PHILLIMORE, J., confirmed the decision of the Commissioners; and the Court of Appeal dismissed the appeal against his judgment.

It was contended on behalf of the appellants that the company was not liable to be assessed, on the following grounds, namely, first, that the company did not reside in the United Kingdom within

(1) *Corum*, The Lord Chancellor (Lord Loreburn), Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson.

(2) [1905] 2 K. B. 612; 74 L. J. K. B. 934; 93 L. T. 63; 54 W. R. 9; 21 T. L. R. 578.

the meaning of section 2 of the Income Tax Act, 1853, Schedule D.; secondly, that the company did not carry on any trade or business in the United Kingdom. With regard to the first ground, it was contended (a) that a corporation incorporated outside the United Kingdom could not reside in the United Kingdom within the meaning of section 2 of the Income Tax Act, 1853; (b) that, even if a corporation incorporated outside the United Kingdom could be so resident, the appellant company was not so resident.

The company was registered in 1888 as a joint-stock company with limited liability, pursuant to Act No. 28 of the year 1861 of the colony of the Cape of Good Hope. The constitution of the company, and its methods of business are set out in great detail in the report of the case in the Court below, but the conclusions of fact are sufficiently stated for the purposes of this report in the judgment of the LORD CHANCELLOR.

For the respondent it was argued that the company was resident in the United Kingdom within the meaning of section 2, Schedule D, of the Income Tax Act, 1853, and carried on its business in the United Kingdom.

Cohen, K.C., and Danckwerts, K.C. (Cassel with them), for the appellants:

The appellant company did not reside in this country, nor did it carry on business here. The two things are kept wholly distinct in Schedule D of the Act of 1853. A company is a legal entity wholly different from its constituent members. A foreign company such as this has no legal existence in the United Kingdom. (See the American decisions *Bank of Augusta v. Earle* [1839] (3), *Blackstone Manufacturing Co. v. Blackstone (Inhabitants)* [1859] (4), and *Ohio and Mississippi Railroad Co. v. Wheeler* [1861] (5).) Its residence is determined by the place of its incorporation. The appellants were registered at Kimberley. A company can have but one residence; and the test is, where is the work of the company controlled and its operations directed? The answer here is, Kimberley, where all the general meetings are held. No one is entitled to

- (3) 13 Peters (U.S.), 519.
- (4) 13 Gray (Mass.), 488.
- (5) 1 Black (U.S.), 286.

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receive notice of a general meeting unless he has an address in South Africa. The head office and the directing power were also at Kimberley. If there be no residence there can be no assessment. *Wingate & Co. v. Webber* [1897] (6) shows that a foreign company cannot be resident in the United Kingdom. The Courts below have confused two wholly different things: residence for the purpose of taxation and residence for service of a writ. The latter need not be residence in the proper sense at all. The distinction is clearly made by BLACKBURN, J., in *Newby v. Von Oppen* [1872] (7); *La Bourgogne* [1899] (8). A temporary stand at a Crystal Palace show was held to justify the service of process: *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor und Motorfahrzeugbau vorm; CuddeLL & Co.* [1902] (9). The mere carrying on of some business here by a foreign company will not constitute residence. In *Att.-Gen. v. Alexander* [1874] (10), in circumstances somewhat similar to the present, the Imperial Ottoman Bank was held to be resident not in London, but at Constantinople.

The appellants do not carry on business here. They are miners and not merchants, as the Court of Appeal appeared to think. The dealings are all in South Africa, and the diamonds delivered to purchasers there. There is but one contract entered into in England in the year, and that can hardly constitute carrying on business. The phrase imports a number of transactions—habitual dealing. The word "habitually" was treated as essential in *Erichsen v. Last* [1881] (11) by JESSEL, M.R., and BRETT, L.J., whose language was expressly approved by Lord WATSON and Lord HERSCHELL in *Grainger & Son v. Gow* [1896] (12). In the latter case Lord HERSCHELL distinguished between trading with a country and carrying on a business within a country, and the distinction is important in the present case. This differentiates this appeal from *London*

(6) 3 Tax. Cas. 569; 34 Sc. L. R. 699.

(7) L. R. 7 Q. B. 293; 41 L. J. Q. B. 148; 26 L. T. 164; 20 W. R. 383.

(8) [1899] A. C. 431; 68 L. J. P. 104; 80 L. T. 845; 8 Asp. M. C. 550.

(9) [1902] 1 K. B. 342; 71 L. J. K. B. 284; 86 L. T. 472; 50 W. R. 226.

(10) L. R. 10 Ex. 20; 44 L. J. Ex. 3; 31 L. T. 694; 23 W. R. 255.

(11) 8 Q. B. D. 414; 51 L. J. Q. B. 86; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357.

(12) [1896] A. C. 325; 65 L. J. Q. B. 410; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.

Bank of Mexico and South America v. Apthorpe [1891] (18) and *San Paulo (Brazilian) Railway v. Carter* [1895] (14).

In any case, the appellant company can only be assessed on such part of its income as is received in the United Kingdom : *Colquhoun v. Brooks* [1889] (15).

The Attorney-General (Sir J. Lawson Walton, K.C.), Sir R. B. Finlay, K.C., and W. Finlay, for the respondent, were not heard.

The House took time for consideration.

The LORD CHANCELLOR (Lord LOREBURN) : The question in this appeal is whether the De Beers Consolidated Mines, Limited, ought to be assessed to income tax on the footing that it is a company resident in the United Kingdom. Had the appellants prevailed upon that question, an ulterior point would have demanded consideration. Your Lordships, however, being satisfied upon the first point, dispensed with further argument.

Under section 2 of the Income Tax Act, 1853, Schedule D, any person residing in the United Kingdom must pay on his annual profits or gains arising or accruing to him "from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and also "from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, it is easy to ascertain where an individual resides, but when the enquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied.

Counsel for the appellants propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa. I cannot

(13) [1891] 2 Q. B. 378; 60 L. J. Q. B. 653; 65 L. T. 601; 39 W. R. 564; 56 J. P. 86.

(14) [1896] A. C. 31; 65 L. J. Q. B. 161; 73 L. T. 538; 44 W. R. 336; 60 J. P. 84, 452.

(15) 14 App. Cas. 493; 59 L. J. Q. B. 53; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277.

adopt this contention. In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Chief Baron KELLY and Baron HUDDLESTON in *Calcutta Jute Mills Co. v. Nicholson* [1876] (16) and *Cesena Sulphur Co. v. Nicholson* [1876] (16), now thirty years ago, involved the principle that a company resides for the purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abide.

It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading. The case stated by the Commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, and that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the

(16) 1 Ex. D. 428; 45 L. J. Ex. 821; 35 L. T. 275; 25 W. R. 71.

mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined the policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may be spent by the directors at Kimberley.

The Commissioners, after sifting the evidence, arrived at the two following conclusions, namely, first, that the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office; secondly, that the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were in fact controlled, managed, and directed. These conclusions of fact cannot be impugned; and it follows that this company was resident within the United Kingdom for purposes of income tax, and must be assessed on that footing. I think, therefore, that this appeal fails.

I will merely add that I agree with the MASTER OF THE ROLLS that residence of a company within the meaning of the Income Tax Acts is not necessarily the same thing as residence for the purpose of serving a writ.

Lord MACNAUGHTEN: I agree.

Lord JAMES OF HEREFORD: I concur in the judgments that have been delivered, holding that the decision of the Court of Appeal should be affirmed.

It is true that the appellant company was registered in the colony, and it was contended that this registration constituted a foreign company which could not be resident within the United Kingdom. But I see no reason why this should be the case. Of course, a foreigner can reside here, and so can a foreign company.

Then upon the facts it seems clear that the business of diamond

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merchants was carried on by the De Beers Co. in England. The principal office was here, the majority of directors met here, and, although the diamonds sold came from Kimberley, the profits were realised within the United Kingdom. The company therefore resided and carried on business here, and necessarily the provisions of the Act of 1853 as to profits and gains arising or accruing to any persons resident within the United Kingdom, and as to profits and gains arising from any trade exercised within the United Kingdom, apply. The appeal must be dismissed.

LORD ROBERTSON: I agree in the judgment of the LORD CHANCELLOR.

THE LORD CHANCELLOR (Lord LOREBURN): I am requested by my noble and learned friend Lord ATKINSON to say that he concurs in the opinion which I have now offered to your Lordships.

Appeal dismissed.

Solicitors: *Hollams, Sons, Coward & Hawksley*, for Appellants.
Solicitor of Inland Revenue, for Respondent.

PRÉFONTAINE *v.* GRENIER (1).

1906, July 11, 12; November 2. P. C.

Company — Director — Liquidation of Bank — Alleged Negligence of President — Liability for Conduct of Officers.

In the liquidation of a company a director cannot be made personally liable on the ground that he has trusted the regularly authorised officers of the company and has failed to detect, and been misled by, misrepresentation or concealment by such officers when there was no reason for doubting their fidelity.

The respondent was president of a bank which became insolvent, and was specially remunerated for his services. The shareholders at the annual general meeting appointed three of their number to constitute a board of audit to look into the operations of the bank, to examine its books and papers, and to report thereon, but these had failed to discover the irregularities which caused the failure of the bank:—

Held, that the respondent was not personally liable for the loss sustained by the bank.

Dovey v. Cory (2) followed.

APPEAL from a decision of the Court of King's Bench of the Province of Quebec (Appeal side), dated 27 February, 1906, affirming a judgment of the Superior Court of Montreal, which had reversed an order of ROBIDOUX, J. The facts are stated in the judgment.

Donald MacMaster, K.C., J. A. Perron, K.C., and G. A. Campbell (all of the Colonial Bar), for the appellant.

Béique, K.C. (of the Colonial Bar), *Rowlatt*, and *D. C. Robertson* (of the Colonial Bar), for the respondent.

Sir ARTHUR WILSON delivered the judgment for their Lordships: The controversy between the parties to this appeal arises out of the collapse of the Banque du Peuple, a bank that carried on business in Montreal and elsewhere in the Province of Quebec, which collapse occurred on 16 July, 1895, when the bank closed its doors.

The bank was constituted in 1843 by an Act of the then

(1) *Coram*, Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson, Sir Henri Elzéar Taschereau, and Sir Alfred Wills.

(2) 8 *Manson*, 346; [1901] A. C. 477; 70 L. J. 753; 85 L. T. 257; 50 W. R. 65.

Canadian Legislature (7 Vict. c. 66). That Act laid down the constitution of the bank on lines which can be briefly stated. Certain specified persons and their successors were created a corporation, were to have the management of the affairs of the bank, and were to be individually, jointly and severally, liable for all the debts contracted by the corporation. With them also lay the appointment of officers, clerks, and servants. The members of the corporation have throughout the case also been called "directors." There was to be another class of persons interested in the bank (*commanditaires*) who were to be subject to no liability beyond the amount of the stock for which they subscribed. The profits were divisible among the shareholders, of both classes alike, according to the amounts of stock held by them.

Section 3 made it clear that the management of the bank lay with the members of the corporation, or so many of them as might be chosen for the purpose by a majority of the body. The same body was to keep regular books of accounts, to be balanced half-yearly. And by section 17: "The said books of account which it shall be the duty of the said corporation to keep, as aforesaid, and the statement and inventory which it shall be the duty of the said corporation to prepare semi-annually as aforesaid, and all vouchers connected therewith, and generally all the deeds, books and papers of the said corporation shall, during the last fifteen days of the months of February and August, in each and every year, but at no other period, be open to the examination of a board of audit, to be elected as hereinafter provided; the said deeds, books and papers shall not, however, be removed from the office of the said bank."

Section 18: "On the first Monday of March in every year during the continuance of this Act, a general meeting of all the stockholders of the said corporation, including as well the members of the said corporation as each of the said partners *in commendam* (*commanditaires*) shall be held at the office in Montreal of the said corporation, of which general meeting one month's notice shall be given in two or more of the newspapers published in the said city of Montreal in the English and French languages; and at the said meeting a full and clear statement of the affairs of the said corporation shall be submitted, containing on the one part the

amount of capital stock paid in, the amount of notes of the bank in circulation, the net profits in hand, the balances due to other banks and institutions, and the cash deposited in the bank, distinguishing deposits bearing interest from those not bearing interest, and, on the other part, the amount of current coins and gold and silver bullion in the vaults of the bank, the value of buildings and other real estate belonging to the bank, the balances due to the bank from other banks and institutions, and the amount of debts owing to the bank, including and particularising the amount so owing on bills of exchange, discounted notes, mortgages and hypothecs, and other securities; thus exhibiting, on the one hand, the liabilities of, or debts due by, the bank, and, on the other hand, the assets and resources thereof; and the said statement shall also exhibit the rate and amount of the then last dividend declared, the amount of profits reserved at the time of declaring such dividend, and the amount of debts to the bank overdue and not paid, with an estimate of the loss which may probably be incurred from the non-payment of such debts."

Section 19: "At the annual general meeting so to take place on the first Monday of March, all the said parties *in commendam* (*commanditaires*) of the said corporation then present, shall by vote elect from among themselves three persons to be a board of audit; and it shall be the duty of the said board of audit so elected to look into all the operations of the said corporation, and to examine the books of account, papers and vouchers of the said corporation, which books, papers and vouchers shall be accessible to the said board of audit as provided for in the seventeenth section of this Act; and it shall be the duty of the said board of audit to make their report thereon at the next general meeting of the said corporation to be held on the first Monday of March as aforesaid; and each partner *in commendam* (*commanditaire*) shall have one vote and no more, and if there be an equal division as to the appointment of any person to be a member of the said board of audit, the partner *in commendam* (*commanditaire*) then present, having the largest quantity of stock in the said corporation, shall have a casting vote; and it shall be lawful for any absent partner *in commendam*

(*commanditaire*) to give their, his or her vote respecting the nomination of the said board of audit by proxy, such proxy being also a partner in *commendam* (*commanditaire*) and being provided with a written authority from his constituent or constituents, and which authority shall be lodged in the bank."

Section 22 empowered the majority of the corporation, if of opinion that it should be necessary to require one or more of its members to devote an exceptional amount of time to the affairs of the bank, to compensate such member or members by salary or otherwise.

The respondent Grenier was president of the bank. At first he received a remuneration of 1,000 dollars, as had his predecessor in office. In March, 1887, his remuneration was raised to 2,000 dollars, under a resolution in the following terms: "Les affaires de routine étant terminées sur la suggestion de M. Brush, vice-président, il est résolu à l'unanimité que la somme de \$1,000 soit placée au crédit de M. Jacques Grenier, en reconnaissance de son zèle, de son assiduité et de ses services comme président de la Banque du Peuple pour l'année se terminant le 1^{er} mars 1887. Cette somme de \$1,000 n'affecte en rien l'allocation ordinaire qui comme d'habitude est portée au crédit du président, tout les six mois."

On 6 May, 1889, Grenier was re-elected as president under a resolution which runs as follows:

"En conformité de l'article cinq de l'acte d'Incorporation, l'assemblée de ce jour a pour objet d'élire le Président et le Vice-Président de la Corporation de la Banque du Peuple pour l'année courante.

"L'ordre de l'assemblée est adopté sur proposition de MM. G. S. Brush, Ecr., secondé par A. Leclaire, Ecr., il fut résolu que J. Grenier, Ecr., soit réélu président de cette Banque pour l'exercice se terminant le premier lundi de mai 1890.

"M. Grenier a la condition toute spéciale qu'aucun document ou transaction fait au nom de la Banque soient bien et dûment par le caissier soumis à lui-même pour être approuvés, signés ou endossés et ce dans le but de partager en toutes occasions avec le caissier la responsabilité des engagements de la Banque lesquels devront aussi être soumis à la direction pour approbation."

Prior to May, 1894, Préfontaine, the appellant, was one of the *commanditaires* of the bank, with a holding of thirty-one shares. He then purchased a further number of sixty-nine shares, and at about the same time he was elected by the directors or members of the corporation to be one of their number. By accepting that position he, of course, became subject to the special liabilities imposed by the Act upon the members of the body which he thus joined.

From that time down to shortly before 16 July, 1895, when the doors were closed, the bank went on in apparent prosperity. As to the cause of the collapse that then occurred there is no doubt. It was due entirely to the fact that the cashier of the bank, without the sanction or knowledge of the respondent Grenier, or his co-directors, and in disobedience to their general instructions, had allowed large overdrafts, partly in current account and partly in other forms, to certain favoured customers, overdrafts which amounted in all to a large sum.

Préfontaine instituted the present suit against Grenier on 24 November, 1900. In his declaration, which was further explained by particulars delivered under an order of the Court, he complained that the defendant, as president of the bank, had made false representations both to the shareholders generally and to Préfontaine himself in particular, by means of which the latter had been induced to purchase the additional shares which he did purchase, and had also been induced to become a director or member of the corporation, in consequence of which he incurred the special liabilities attaching to one of that body. He complained, secondly, that the defendant had been guilty of negligence in the conduct of the affairs of the bank, and failed in the duty which lay upon him as president under the circumstances of the case, and had so brought about the failure of the bank and the losses sustained by the plaintiff. He claimed as damages 8,625 dollars, which he had paid for his shares, and 45,914.89 dollars, the amount which he ultimately had to pay, as the result of the liquidation, in respect of his liability as a director or member of the corporation.

Thus from the early stages of the case the plaintiff has been suing upon two alleged causes of action—misrepresentation and negligence. These causes of action have not always been kept

apart in argument; but they are perfectly distinct, and governed by different legal principles.

The case was tried before Mr. Justice ROBIDOUX, who decided in favour of the plaintiff, so far as concerned the amount which he had been obliged to pay in respect of his liability as director or member of the corporation, while he dismissed the claim so far as it concerned the price of the shares.

The defendant brought the case by way of review before three Judges, who agreed with Mr. Justice ROBIDOUX on the merits of the case, but by a majority decided that the action was barred by prescription.

From that decision there was a further appeal to the Court of King's Bench, and that Court considered it unnecessary to deal with the question of prescription, because it considered that the plaintiff's case failed irrespective of that question. Against that judgment the present appeal has been brought.

The case of the plaintiff appellant, so far as it rested upon misrepresentation was based, in the argument before their Lordships, upon the report issued for the year 1898, dated 1 March, 1894, with the statements of accounts annexed to that report, read in connection with the like reports and statements relating to previous years.

The alleged misrepresentations thus relied upon were three in number. First, the report said, "All our agencies have been thoroughly inspected during the year." In fact, the agencies outside Montreal had been inspected, but certain branches or agencies within that city had not been so inspected. It is unnecessary to inquire whether, on the proper construction of the report, the words in question referred to all the agencies or branches, including those within the city of Montreal, or only to those outside the city, because it was no part of the plaintiff's case that he was misled into purchasing shares or becoming a director by any such misrepresentation as that now contended for. In his declaration, supplemented by his particulars, the plaintiff defined his case in all points; and he nowhere said that he was induced to act by any such misrepresentation as this. He did in his particulars put forward want of inspection of the head office as an instance of negligence or default on the part of the defendant; but that is a

totally different matter, and belongs to a different part of the case.

It was next said that the report and the account annexed to it untruly represented that the bank possessed a reserve fund of 600,000 dollars. But in the opinion of their Lordships the account, which is the more important document of the two, and which was the basis of the report, makes no such representation. That account is of the nature of a balance-sheet. It enters the amount of the reserve fund as an item under the head of liabilities, as it was proper to do; but when one turns to the other side of the account, under the heading "Assets," there is nothing to suggest that the bank held any investment of corresponding amount which could be thought to represent the reserve fund. There was nothing which could properly be understood as conveying that that fund was more than an estimated amount, or was anything separately held or separately invested.

Then it was said that there was a misrepresentation in another respect. The amounts of the overdrafts, improperly allowed by the cashier to certain customers, were included in the amounts which appeared in the account as assets, and there was no complaint that the aggregate on this side of the account was not correct. But the suggestion was that the sums in question ought to have been included in the item "Notes and bills overdue, unsecured," whereas in fact they were included in "Loans and discounts current." It appears to their Lordships that the sums in question were at least as correctly treated, in the account, in the manner in which they were treated, as they would have been if entered in the manner in which it is said that they ought to have been. Their Lordships therefore agree with the Court of King's Bench that the plaintiff's case based upon misrepresentation fails on the facts, and it is unnecessary to consider any of the questions of law which might otherwise have arisen.

The second branch of the plaintiff's case is based on alleged negligence on the part of the defendant in the discharge of his functions as president of the bank. It has been already stated that the collapse of the bank was due to overdrafts, which the cashier had irregularly and improperly allowed to certain customers. The main ground upon which the defendant was charged with

negligence was that he had not exercised such a control over the details of the bank's business as to enable him to detect and put a stop to the irregular practices of the cashier.

Before examining the question of his liability, it may be well to notice that the cashier was the principal executive officer of the bank under the directors. There is nothing to show that either the defendant or his brother directors had any reason to suspect or distrust that officer. The accounts periodically submitted to the directors were prepared by him, or under his directions. They were duly audited by the board of auditors appointed under section 19 of the Act by the body of *commanditaires*, such auditors being thus entirely independent of the directors. In those accounts the total assets and liabilities of the bank were correctly stated according to the books, but the accounts were so framed as not to disclose the fact that the totals included unauthorised overdrafts. The contention on the part of the plaintiff was that it was the duty of the defendant to have exercised such control as to have detected the overdrafts which were, in fact, concealed from him and from his co-directors.

The alleged duty of the defendant was based—first, upon the fact that he was the president of the bank; and secondly, that he received a salary for acting in that capacity. Reliance was further placed upon the resolution already cited on 6 May, 1889.

In this country questions as to the nature and extent of the duty and responsibility of directors and others, in respect of the conduct of the affairs of companies, have been frequently under consideration. Attempts have repeatedly been made to render them personally liable, on the ground that they have trusted the regularly authorised officers of the company; that they have failed to detect, and been misled by, misrepresentation or concealment by such officers, when there was no reason for doubting their fidelity. But such attempts have not been successful. It is sufficient to refer to the case of *Dovey v. Cory* [1901] (2), in which the subject was fully considered by the House of Lords.

Their Lordships think that in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special

rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and the exigencies of business.

The fact that the defendant was remunerated for his services as president does not seem to their Lordships to strengthen the case against him. Indeed, the modest scale of his remuneration is scarcely consistent with the idea that he—a man of considerable position, and with a business of his own—was ever expected to give his time and labour to the detailed control of the work of the bank. It is much more consistent with the idea that he was expected to do what he did—that is to say, to devote some two hours a day to the business of the bank—two hours largely taken up by official interviews.

The resolution of 6 May, 1889, is very hard to follow, and no one has succeeded in construing it clearly; but it seems to their Lordships certainly not to strengthen the case of the plaintiff. So far as anything can be collected from it, it seems to show that the obligation of the defendant to share responsibility with the cashier was limited to the "engagements of the bank," whatever those words may mean; and, further, that the directors were also to be bound to approve each transaction falling within that class. The grounds, therefore, put forward by the plaintiff as supporting the general allegation of the defendant's liability, appear to their Lordships insufficient to do so. And, further, the Court of King's Bench was, in their Lordships' opinion, right in laying stress upon the fact that the accounts laid before the defendant and his co-directors, in which it is said that the defendant ought to have detected what was concealed, had been audited by a wholly independent body of auditors, and certified by them as correct, and there is nothing shown which should have led the defendant to doubt the sufficiency of the audit.

A special charge of negligence was pressed against the defendant in the argument of the appeal, based upon the evidence of a M. Gagnon, who held the post of inspector under the bank. There is nothing in the evidence to show the terms of his appointment, and no formal definition of the extent of his duties. The defendant said in his evidence that Gagnon's duties were limited to the inspection of branches and agencies outside the city of Montreal.

On one occasion Gagnon was specially employed to examine into a matter in the head office. He says he was dissatisfied with what he found, and that he pressed upon the defendant that he, Gagnon, should be empowered to make a completer inspection. He says that his suggestion was not very well received—that the defendant rejected the idea that the inspector should be put to supervise the work of the head official of the bank.

It was contended that the omission to authorise the suggested inspection was an act of negligence on the part of the defendant, and that if the suggested inspection had been carried out the over-drafts which led to the fall of the bank would, or might, have been brought to light. Their Lordships are not prepared to say that there was negligence in omitting to sanction an inspection inconsistent with the ordinary method of conducting the affairs of the bank, nor has it been shown that there was any direct connection between the matters excepted to by Gagnon and the fatal overdrafts.

Their Lordships agree with the Court of King's Bench that the charge of negligence has not been established in fact. It is therefore unnecessary to consider (what might have been a difficult question of law) whether the obligation of the defendant, which, whatever its nature and extent, was primarily a contractual obligation, could be made the ground of an action by an individual member of the corporation, as distinguished from the bank in its entirety, and from the smaller body, the directors or members of the corporation.

Their Lordships will humbly advise his Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors: *Hills & Halsey*, for the Appellant.

Blake & Redden, for the Respondent.

HINDS v. BUENOS AYRES GRAND NATIONAL
TRAMWAYS CO.

1906, October 26. WARRINGTON, J.

Company—Debenture Stock—Money Borrowed for Purposes of Construction—Incidence of Interest—Profits.

There is no general rule of law compelling a company to charge interest on money borrowed for purposes of construction against revenue and prohibiting it from charging it, during construction, to capital account.

A company borrowed money, by the issue of 5 per cent. conversion debenture stock, for the purpose of converting its tramway system to electric traction, at the estimated cost of 10,000*l.* per mile:—

Held, that it was entitled to charge against capital not only the 10,000*l.*, but also 500*l.* interest, in respect of each mile until completion and opening to traffic.

The defendant company was incorporated under the Companies Acts in 1889. Its present capital was 1,075,000*l.* divided into 215,000 shares of 5*l.* each. Subsequently the company entered into an agreement dated 27 November, 1892, whereby arrangements were made for the borrowing by the company of money for the purpose of converting its then existing tramways to electric traction, the main object of the agreement being to regulate the terms on which the systems of the defendant company and another company, the Buenos Ayres New Tramways Co., Limited, should be worked for the common benefit of both companies, the manner in which profits should be divided, and the manner in which conversion debenture stock of each company should be created for the purpose of the conversion to electric traction. Pursuant to the agreement, the defendant company issued a total of 600,000*l.* 5 per cent. conversion debenture stock. The Buenos Ayres New Tramways Co. also made an issue of conversion debenture stock, and with the proceeds of the two issues the proposed conversion of the systems to electric traction had been commenced and was proceeding, the work being carried out by sections. The defendant company was also authorised to issue 80,000*l.* income debenture bonds of 100*l.* each at 5 per cent. interest payable exclusively out of profits, nearly all of which had been issued.

The directors of the defendant company considered that the proper mode of dealing with the interest on the conversion debenture stock was to apportion to each section of its lines converted to

electric traction such a proportion of the total stock issued for the purpose of providing the cost of conversion as the length of the particular section bore to the total length of line to be converted, and then to charge interest on such proportion of the stock to capital account until the section was opened for traffic and so became productive, such interest being thereafter charged to revenue account. They accordingly resolved, estimating the cost of conversion apart from interest on the capital employed in the conversion as approximately 10,000*l.* per mile, that the interest on the conversion debenture stock should be treated as part of the cost of construction and chargeable to capital account up to the date of completion of each mile and thereafter to revenue account.

The plaintiff, as a shareholder of the defendant company, considered that the course which the directors proposed to adopt was *ultra vires*, and prejudicial to the interests of the shareholders, and accordingly issued the writ in this action, claiming a declaration that the interest payable on the conversion debenture stock should not be treated as part of the cost of the conversion and should not, during any period whatever, be charged to capital account, but that the whole of such interest should for the purpose of computing the profits of the company be considered payable only out of revenue. He also claimed an injunction to restrain the company from paying any interest on the income debenture bonds unless and to the extent that profits of the company existed after computing the same in accordance with the above declaration.

The plaintiff now moved for an injunction as claimed in the writ. The motion was treated as the trial of the action.

H. Terrell, K.C., and Martelli, for the plaintiff:

The question is how the interest is to be allocated, whether to capital account or, as the plaintiff says, to profit and loss account. The conversion stock is a debt, and the interest on it is an annual charge in respect of a debt, and an annual charge is properly charged to the revenue account.

[WARRINGTON, J.: Does not *Verner v. General and Commercial Investment Trust* [1894] (1) bear upon it?]

(1) 1 Manson, 136; [1894] 2 Ch. 239; 63 L. J. Ch. 456; 70 L. T. 516; 7 Rep. 170.

That case was doubted in *Dovey v. Cory* [1901] (2). The interest of the income debenture bonds is payable only out of profits. So it is really a question of how profits are to be ascertained. *Bloxam v. Metropolitan Railway* [1868] (3) shows what is capital and what is income. The company says that two different modes of calculation must be employed—one as to the section of line which has been electrified, the other as to that which is in course of electrification—and that in the latter case interest is to be charged against capital, and in the former against revenue—that it is a charge on capital until the line is open for traffic, and the moment afterwards on revenue. There is no principle of law which governs the matter: and, if it be said that it must be governed by the consideration of what commercial men would do, there is no principle by which commercial men would be guided in such a case: one commercial man might do one thing and one another. Nothing can be charged to capital except what represents capital employed in the undertaking. The incidence of the charge must be the same all through, whether it falls on capital or income; it cannot fall for a time upon one and for a time upon the other. In *Buckley on Companies*, 8th ed., p. 591, it is stated that the interest on capital employed in the construction of works, and in the meantime unproductive, may “under certain circumstances” in fact form part of the capital employed in the work, and may be properly chargeable to capital account, but it is not said what the “certain circumstances” are.

[*Lee v. Neuchatel Asphalte Co.* [1889] (4), *In re Alexandra Palace Co.* [1882] (5), and *Bardwell v. Sheffield Waterworks Co.* [1872] (6) were also mentioned.]

Gore-Browne, K.C., and Sargant, for the company:

The question is already covered by the authorities and, in particular, by what is said by Lord CHELMSFORD, L.C., in *Bloxam v. Metropolitan Railway* (3). The interest on the conversion stock is a charge which may properly go to capital account. Looked at

(2) 8 *Manson*, 346; [1901] A. C. 477; 70 L. J. Ch. 753; 85 L. T. 257; 50 W. R. 65.

(3) L. R. 3 Ch. 337; 18 L. T. 41; 16 W. R. 490.

(4) 41 Ch. D. 1; 58 L. J. Ch. 408; 61 L. T. 11; 37 W. R. 321; 1 Meg. 140.

(5) 21 Ch. D. 149; 51 L. J. Ch. 655; 46 L. T. 730; 30 W. R. 771.

(6) L. R. 14 Eq. 517; 41 L. J. Ch. 700; 20 W. R. 939.

from the point of view of abstract principle, what the directors are doing is, by the expenditure of borrowed money, to bring into existence a capital asset, and they are, in charging the interest on the money to the capital account, only putting against capital the cost of producing the asset. The principle on which interest may be paid is stated by LINDLEY, L.J., in *Verner v. General and Commercial Investment Trust* (1). What is to be used for bringing into existence a capital asset may be used for payment of interest. *Dent v. London Tramways Co.* [1880] (7) and *Jamaica Railway v. Attorney-General of Jamaica* [1892] (8) are both somewhat analogous cases. The question really is, what would commercial men do in such a case? Up to the completion of the construction, the interest is properly treated as being part of the purchasing money of the asset that is being created; after that it is chargeable in the usual way to revenue.

H. Terrell, K.C., in reply :

What was said by LINDLEY, L.J., in *Verner v. General and Commercial Investment Trust* (1), was qualified by Lord DAVEY in *Dovey v. Cory* (2).

WARRINGTON J.: The Buenos Ayres Grand National Tramways Co., Limited, has issued certain debentures, the interest on which is payable out of the profits of each year and the profits only. The question which the Court has to determine is whether the company is bound by law to charge against the profits of the year interest on money which has been borrowed expressly for the purpose of what I may call construction—it is not literally construction, but the conversion of the company's horse line into an electrical traction line; but for practical purposes it is the same thing as money borrowed for the purposes of construction. The directors propose, unless they are so bound, to charge as part of the expenses of constructing each mile of the new line, not only the money actually expended in paying for that construction, but also the proportionate part of the interest on the money which they have borrowed for purposes of construction. Is there anything that

(7) 16 Ch. D. 344; 50 L. J. Ch. 190; 44 L. T. 91.

(8) [1893] A. C. 127.

renders it incumbent on the company to charge that interest to the revenue account? That is what the plaintiff, to succeed, must make out.

In the first place, it is not contended that there is anything in any of the statutes regulating joint-stock companies under the Companies Acts which in terms compels the company so to charge this interest. Neither is there any conventional stipulation to that effect in the documents which regulate the constitution of this company. The question I have really to decide is: Is there, independently of statute or conventional stipulations affecting the company, any general rule of law which compels a company to charge interest on money borrowed for the purposes of construction against revenue, and prohibits it from charging that interest during construction to capital account?

In my opinion there is no such principle of law. I think the authorities establish that the principle which regulates all these questions is that which is expressed by Lord MACNAUGHTEN in *Jamaica Railway v. Attorney-General of Jamaica* (8). He says, in reference to expenditure which *prima facie*—expenditure which in that particular case—was income expenditure: “Nor is every item of expenditure necessarily to be debited wholly against the income of the period in which it occurs. It may be fair and proper to spread some items over a longer time.” Then he refers to Table A of the Companies Act, and then comes words which I think are important here: “The company is bound to conduct its business fairly and to make up its accounts fairly, with a due regard to the obligations which it has undertaken towards the bondholders. That is the measure of the duty in this respect cast upon the directors. It would perhaps not be easy to define it more precisely.” There are one or two other authorities which have a material bearing on this case. I do not think that *Verner v. General and Commercial Investment Trust* (1) has a direct bearing on the case, but there are some observations of Lord Justice LINDLEY which are of some assistance. He says: “A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract, there is no law to this effect; and, in my

opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard and fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law." I think Lord Justice LINDLEY had in his mind, in that passage of his judgment, the same idea which was in the mind of Lord MACNAGHTEN when he delivered his judgment in *Jamaica Railway v. Attorney-General of Jamaica* (8). In considering the accounts of the company, the only principle by which you can be guided—of course, unless there are some express stipulations—must be what a commercial man acting fairly and honestly in the conduct of his business would consider the proper thing to do. I think that that is illustrated by *Bloxam v. Metropolitan Railway* (8). There the question which I have to determine directly arose. Vice-Chancellor Wood thought that the interest on borrowed money ought clearly to be charged against revenue, but the matter came before the LORD CHANCELLOR, who expressed the gravest doubts, without expressly dissenting, as to whether there was any such rule, so stringent, as the VICE-CHANCELLOR had thought, and it is impossible to read Lord CHELMSFORD's judgment without seeing, although he carefully guarded himself against expressly dissenting, what his views were. In the subsequent case of *Bardwell v. Sheffield Water-works Co.* (6) Vice-Chancellor MALINS allowed the interest on money borrowed for the purpose of capital expenditure during construction to be added to the amount expended and to be treated as a capital charge. That is how the authorities stand.

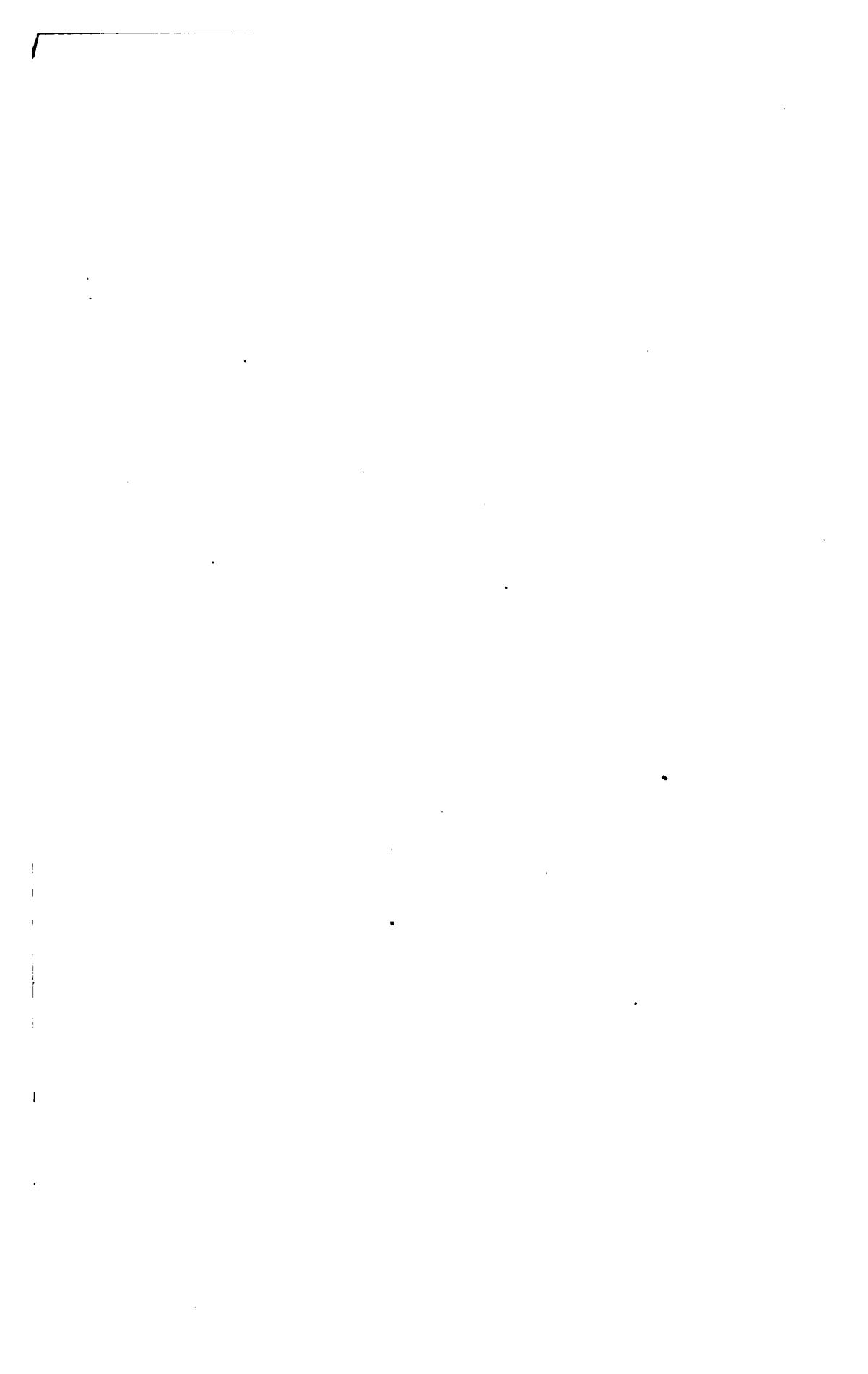
Now let me look at what it really is that the company is proposing to do. It is creating capital by means of which it will, or it is hoped it will, hereafter be possible to earn profits for the company. It is not simply employing contractors to find the money and do the work. It is finding the money itself, by borrowing it. What, then, does each mile of line cost the company under these circumstances? What is it that it expends in constructing each mile of line, taking the amount of the borrowed money expended on that line to be 10,000*l.*, that being the company's estimate? The 10,000*l.* is borrowed for that particular

purpose. The company has to pay interest on that 10,000*l.* during the period that construction is taking place. In my opinion the asset which it is so constructing costs it not only the 10,000*l.*, but the 10,000*l.* *plus* the amount of interest during the period of construction, and that is what the Company is out of pocket during the construction of each mile of line. It seems to me that the company is entitled—I do not say bound—if it thinks fit, to charge in its accounts as the cost of each mile of line not only the 10,000*l.*, but the 10,500*l.* That decides the present case.

In my opinion, the plaintiff's motion fails. The motion being treated as the trial of the action, there will be an order that, the Court being of opinion that the company is not bound to charge the interest on the conversion debenture stock, during conversion, against revenue, the action be dismissed.

Solicitors : *Budd, Johnson & Jecks*, for the Plaintiff.

Paines, Blyth & Huxtable, for the Defendants.



DIGEST OF CASES REPORTED IN THIS VOLUME.

I. BANKRUPTCY AND BILLS OF SALE CASES.

BANKRUPTCY.

ACT OF BANKRUPTCY—*Mortgage by Debtor*—*Knowledge of Mortgagee*
—*Redemption of Security*—*Relation back of Title of Trustee in Bank-
ruptcy*—*Liability of Mortgagee*—*Bankruptcy Act, 1883, s. 9, sub-s. 2;*
ss. 43, 49.

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A secured creditor who has notice of an act of bankruptcy by his debtor within three months is not entitled before the expiration of that period to receive payment of the debt from his debtor, and consequently the debtor cannot make a good tender to the creditor and require him to give up his securities to the debtor on payment of the amount due.

Stockbrokers were in April, 1906, declared defaulters on the Stock Exchange, and an official assignee was appointed according to the rules of the Stock Exchange. They had deposited with the defendants certain securities to secure a loan. The official assignee tendered the amount due in respect of the loan and called on the defendants to hand over the securities. They refused on the ground that, having notice of an act of bankruptcy by the stockbrokers—namely, the assignment to the official assignee—within three months, they would not be safe in handing over the securities till the expiration of three months, for if bankruptcy proceedings were taken within that period the title of the trustee in bankruptcy would relate back. The stockbrokers and official assignee then sued for delivery up of the securities on payment of the amount due:—

Held, that the plaintiffs could not require the defendants to give up the securities.

Per CURRIAM: If the official assignee were prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings were taken or the period of three months had expired, an order should be made empowering him so to do. If he were not, no immediate judgment should be given in the action, but it should be directed to stand over until it could be seen who was the person entitled to redeem.

In re Lawford and Lawrence, Ex parte Nichols, overruled. *Pons-
ford, Baker & Co. v. Union of London and Smiths Bank* . . .

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ADMINISTRATION OF ESTATE OF DECEASED INSOLVENT— Disclaimer of Lease—Bankruptcy Act, 1883, ss. 55, 125.	
Section 55 of the Bankruptcy Act, 1883, which gives power to the trustee in bankruptcy to disclaim onerous property, applies to administrations in bankruptcy under section 125.	
<i>Dictum of CAVE, J., in In re Gould, Ex parte Official Receiver, followed. In re Mellison, Ex parte Day</i>	201
ADMINISTRATION ORDER — County Court — Judgment for Debt incurred subsequently to Order — Stay of Execution on Judgment — Bankruptcy Act, 1883, s. 122, sub-s. 5.	
Section 122, sub-section 5, of the Bankruptcy Act, 1883, which provides that, during the continuance of an administration order, "no creditor shall have any remedy against the person or property of the debtor" in respect of a debt which the debtor has notified to a County Court, "except with the leave of that County Court, and on such terms as that Court may impose," applies to subsequent creditors as well as to creditors before the date of the order. Therefore a creditor whose debt has been incurred after and without notice of the date of the administration order is only entitled to be scheduled as a creditor under the order, unless the Court in its discretion gives him leave to issue execution, or the order has been set aside or rescinded.	
<i>In re Frank</i> not followed. <i>Pearson v. Wilcock</i>	214
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s. 7, sub-s. 3	1
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s. 49	321
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s. 55	201
s. 57, sub-s. 6	229
s. 89, sub-s. 3	229
s. 122, sub-s. 1.	207
—, sub-s. 5	214
s. 125	201
s. 168	337

DEED OF ASSIGNMENT—Act of Bankruptcy—Payment of Debt to Assignee—Bankruptcy Petition—Right of Trustee to Payment of Debt—Receipt of Balance from Assignee—Fication—Following Debt into Hands of Trustee—Bankruptcy Act, 1883, s. 43.

Where a debtor pays to an assignee under a deed of assignment for the benefit of creditors generally a debt thereby assigned, and subsequently a petition in bankruptcy is presented and a receiving order made upon the act of bankruptcy committed in the execution of the deed, the trustee in bankruptcy may claim repayment from the debtor of the debt so paid to the assignee, unless the

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debtor can show that the money paid by him, or some part thereof, has come to the hands of the trustee in bankruptcy.

Judgment of Divisional Court affirmed. *Davis v. Petrie* 344

DEED OF ASSIGNMENT—Assent of Petitioning Creditor—Further Act of Bankruptcy—Estoppel.

At a meeting of creditors it was resolved that a deed of assignment of all the debtors' property should be executed for the benefit of their creditors. B., one of the creditors present, did not assent or dissent; but when a nominee of the debtors was proposed as trustee of the deed he objected, and suggested another name, which was adopted by the meeting. B. served on the debtors a bankruptcy notice founded on a judgment debt, which the debtors failed to comply with:—

Held, that, though B. might by his conduct be prevented from availing himself of the deed of assignment as an act of bankruptcy, yet he was not so bound by the deed as to be precluded from petitioning and obtaining a receiving order for non-compliance with the bankruptcy notice.

Observations of Lord CAIRNS, L.J., in *In re Stray, Ex parte Stray*, followed. *In re A. W. Mills & Co.* 9

— *Clause empowering Trustee to Pay any Dissenting Creditor in Full—Recognition of Deed by Petitioning Creditor—Estoppel—Bankruptcy Act, 1883, s. 7, sub-s. 3.*

A creditor who by his acts recognises the title of the trustee under a deed of assignment executed by a debtor for the benefit of his creditors cannot afterwards rely on the execution of the deed as an act of bankruptcy, notwithstanding that the creditor has all along refused to assent to it.

A clause in a deed of this character empowering the trustee to pay in full any creditor who may decline to execute or assent to the deed is an improper clause. *In re Brindley, Ex parte Brindley* 1

MORTGAGE OF LIFE POLICIES—Payment of Premiums by Third Party—Bankruptcy of Mortgagor—Death of Mortgagor—Repayment of Premiums to Third Party out of Estate.

The trustee in bankruptcy is an officer of the Court, and as such must do what the Court considers to be just.

Where life policies had been mortgaged to secure a loan from bankers and a third party had kept up the premiums on the life policies and paid the interest on the loan, the trustee in bankruptcy having become possessed of the policy moneys owing to the bankruptcy and death of the party insured, the COURT ordered the trustee in bankruptcy to refund to the third party the money expended on keeping up the premiums and interest. *In re Tyler, Ex parte Official Receiver* 350

POOR LAW—Guardian—Disqualification for Office—Composition or Arrangement with Creditors—Administration Order of County Court for Partial Payment of Debts—Bankruptcy Act, 1883, s. 122—Local Government Act, 1894, s. 46, sub-s. 1 (c).

Section 46, sub-section 1 (c), of the Local Government Act, 1894, which provides that a person shall be disqualified for being a parish or district councillor or guardian if he has made a composition or arrangement with his creditors, applies to every composition, howsoever made, which the debtor has made with his creditors. A guardian, against whom a judgment had been recovered in a County Court, preferred to that Court a request under section 122 of the Bankruptcy Act, 1883, for an order for the administration of his estate and the payment of his debts, and stated that he proposed to pay 10s. in the pound. The Court made an order for the payment of his debts to that extent:—

Held, that he had made a composition with his creditors, and was therefore disqualified for being a guardian. *Bradfield v. Cheltenham Guardians*

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PRACTICE—Costs—Sale by Trustee of Mortgaged Property—Proceeds of Sale—Duty of Taxing Officer—Solicitors' Remuneration Act, 1881, General Order, Sched. 1—Bankruptcy Rules, 1886, Appendix, Part II., General Regulations, r. 2.

In a taxation of a solicitor's costs under Rule 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886, the Taxing Master in Bankruptcy is not concerned to determine out of what fund the taxed costs are to be paid. His duty is to tax the bill in accordance with the General Order under the Solicitors' Remuneration Act, 1881, and he should then direct by his allocatur that the amount of the bill as taxed is to be paid in accordance with the above-mentioned rule. It will be for the parties to determine out of what fund the costs are to be paid.

Semble, where mortgaged property is sold, the words "proceeds of sale" in the proviso of the above-mentioned rule mean the net proceeds of sale after the charges on the property have been paid off. *In re Garner, Ex parte Pedley*

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TRUSTEE—Application for Directions—Compromise of Claims—Complicated Circumstances—Discretion of Court—Duty of Trustee to determine Matter—Bankruptcy Act, 1883, s. 57, sub-s. 6; s. 89, sub-s. 3.

On an application to the Court by a trustee in bankruptcy, under sub-section 3 of section 89 of the Bankruptcy Act, 1883, for directions in relation to a particular matter arising under the bankruptcy, there is no obligation on the Court to give directions.

Where the circumstances are complicated the trustee ought to deal with the matter himself, with the assistance of the committee of inspection, and ought not to apply to the Court to relieve him from the obligation of forming his own judgment in the matter placed upon him by the Bankruptcy Act. *In re Pilling, Ex parte Salaman*

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UNDISCHARGED BANKRUPT—*After-acquired Equitable Real Estate—Equitable Mortgage—Intervention by Trustees in Bankruptcy—Bankruptcy Act, 1883, ss. 44, 54, 168.*

An undischarged bankrupt cannot, even before the intervention of his trustee in bankruptcy, deal with real estate acquired after his bankruptcy, so as to give the person with whom he deals, even though a *bona fide* purchaser for value without knowledge of the bankruptcy, a good title as against the trustee.

In this respect it makes no difference whether the interest of the bankrupt in the after-acquired real estate be equitable or legal.

Decision of CHITTY, J., in the case of legal real estate in *In re New Land Development Association and Gray*, followed in the case of equitable real estate. *Preston's Trustee v. Cooke* 337

BILLS OF SALE.

APPARENT POSSESSION—*Registration—Bona fide Purchase—Execution Creditor—Bills of Sale Act, 1878, s. 8.*

The owner of certain furniture, which was in a house occupied by him, sold it in 1903 to a company by an agreement which was not registered as a bill of sale, and in 1904 the company *bona fide* sold it to the original owner's mother by a document which was not registered. The furniture remained in the apparent possession of the original owner till 1905, when it was seized in execution under a judgment obtained against him. His mother having claimed the furniture:—

Held, that as she could not show either a registered title or that she had taken possession so as to render registration unnecessary, the title of the execution creditor must prevail. *Hopkins v. Gudgeon (Gudgeon, Claimant)* 363

BILLS OF SALE ACT, 1878 (41 & 42 Vict. c. 31)—

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BILLS OF SALE ACT, 1882 (45 & 46 Vict. c. 43)—

s. 9 353

STATUTORY FORMS—*Deviation from—Title Deeds included in Schedule—Assigned as Personal Chattels without creating Charge on Land—Construction—Bills of Sale Act (1878) Amendment Act, 1882, s. 9.*

The owner of land may deal with the title deeds as mere personal chattels divorced from the land.

Dicta in Barton v. Gainer approved and followed.

By a bill of sale the grantor assigned to the grantees the several chattels and things specifically described in the schedule thereto annexed then being in and about the "Lion Hotel," by way of security for a loan; and thereby covenanted to insure the chattels and things, and to pay rates and taxes in respect of the premises in which the same might be. It was further provided that the grantees should be at liberty to remove and sell the same at the expiration of

five days from seizure or taking possession thereof. The schedule specifically enumerated certain furniture and effects, and concluded with "Assignment of lease of the 'Lion Hotel,' and all the muniments of title referred to in the said assignment":—

Held (by VAUGHAN WILLIAMS, L.J., and ROMER, L.J.; dissentient COZENS-HARDY, L.J.), that, according to the true construction of the bill of sale, the title deeds included in the schedule were granted as personal chattels severed from the leasehold interest to which they related, and not with the intention of creating any charge thereon, and that therefore the bill of sale was not void under the Bills of Sale (1878) Amendment Act, 1882, s. 9.

Cochrane v. Entwistle distinguished. *Swanley Coal Co. v. Denton*. 353

II. COMPANY CASES.

COMPANY.

AUDIT—Accounts—Balance-sheet—Reserve Fund not disclosed by Balance-sheet—Auditors not to disclose Information—Duty of Auditors—Ultra vires—Companies Act, 1900, ss. 21, 23.

Sections 21 and 23 of the Companies Act, 1900, require by implication that there shall be annually an audit of the accounts of a company resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better; and a balance-sheet so worded as to show that there is an undisclosed asset, the existence of which makes the financial position better than is shown, is not necessarily inconsistent with the Act.

The statutory majority of shareholders may resolve that as to particular items of the company's business it is to the company's interest that there shall be secrecy, and that the auditors shall not disclose them to the shareholders unless their duty under the Act requires it; and it is a compliance with the Act if the auditors report that they have examined the accounts as to those items and are satisfied with them, and that the funds have been employed in manner authorised by the company's regulations, provided the auditors are *bona fide* satisfied that in making this report and nothing further they are truly reporting as to the true and correct view of the state of the company's affairs.

But it is inconsistent with the Act that the auditors should be bound, even when they think that the true state of the company's affairs is affected by facts relating to the undisclosed funds, to withhold all information with regard to them from the shareholders; and any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled

as material for the report which the Act requires them to make as to the true and correct state of the company's affairs are inconsistent with the Act.

At extraordinary general meetings of a company there were carried and confirmed special resolutions for the formation of an internal reserve fund which need not be shown in or disclosed by the balance-sheet, and as to which the directors need not give any information to the shareholders. The directors were to have an absolute discretion as to the investment of the fund, and as to its application for any purpose serving, protecting, or advancing the interests of the company or preserving or promoting the value of the company's undertaking, assets, or goodwill. The fund and all particulars relating to it were to be disclosed to the auditors, whose duty should be to see that it was applied for the purposes of the company as above mentioned, but not to disclose any information with regard to it to the shareholders or otherwise:—

Held, that, in regard to the last-mentioned provision, the resolutions went too far, and that the company must be restrained from acting upon them. *Newton v. Birmingham Small Arms Co.*

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BYE-LAWS OF COMPANY—*Sale of Land to Company—Invalidity of Resolution authorising Sale.*

The invalidity under the bye-laws of a company of a resolution purporting to authorise the purchase of land by the company cannot affect the rights of the vendor in the absence of notice to him, the bye-laws being matters of internal management to which those who deal with the company have no means of access. *Montreal and St. Lawrence Light and Power Co. v. Robert*

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CAPITAL—*In Excess of Wants of Company—Reduction by Return of Capital—Form of Minute—Companies Act, 1867, s. 15—Companies Act, 1877, ss. 3, 4.*

A company passed a resolution to reduce its capital, which was in excess of its wants, from 241,510*l.* in shares of 1*l.* each to 211,321*l. 5s.* in shares of 17*s. 6d.* each, the reduction to be effected by returning 2*s. 6d.* per share to each of the shareholders. Upon a petition to confirm the reduction, the COURT gave leave to return 2*s. 6d.* per share, and, subject to the production of evidence that the 2*s. 6d.* had, in fact, been repaid, ordered (the order to be postdated) that the reduction be confirmed, and approved a minute to be registered under section 15 of the Companies Act, 1867, as follows: "The capital of the Calgary and Edmonton Land Co., Limited, is henceforth 211,321*l. 5s.* divided into 241,510 shares of 17*s. 6d.* each, instead of the original capital of 241,510*l.* divided into 241,510 shares of 1*l.* each. At the time of the registration of this minute the sum of 17*s. 6d.* has been and is to be deemed paid up upon each of the said shares." *In re Calgary and Edmonton Land Co., Limited and Reduced*

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CAPITAL—Reduction of—Capital in Excess of Wants of Company— Return of Capital—Procedure—Form of Minute—Companies Acts, 1867, ss. 9, 15; and 1877, ss. 3, 4.	
A company limited by shares duly passed a special resolution in accordance with section 51 of the Companies Act, 1862, reducing its capital from 80,000 <i>l.</i> in 16,000 shares of 5 <i>l.</i> each (2 <i>l.</i> 10 <i>s.</i> paid up) to 32,000 <i>l.</i> in 16,000 shares of 2 <i>l.</i> each, of which 1 <i>l.</i> was to be deemed paid up, the reduction to be effected by returning to the shareholders 1 <i>l.</i> 10 <i>s.</i> per share of which 1 <i>l.</i> might be called up again:—	
<i>Held</i> , on petition, that an order confirming the reduction could be made, although the 1 <i>l.</i> 10 <i>s.</i> per share had not yet been returned, and that the proper minute to approve for registration was one which, after stating the reduced capital, contained the words “At the time of the registration of this minute the sum of 1 <i>l.</i> , and no more, is proposed to be deemed to have been paid up on each of the said shares.”	
<i>In re Calgary and Edmonton Land Co.</i> not followed. <i>In re Lees Brook Spinning Co.</i>	262
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r. 94	60
r. 107	60

CONTRACTS—Date when Entitled to Commence Business—Contracts Previous to that Date—Contracts Provisional only—Contracts for Preliminary Expenses—Companies Act, 1900, s. 6, sub-s. 1, 3.

The word "provisional" in sub-section 3 of section 6 of the Companies Act, 1900, means that the contracts made by a company before the date at which it is entitled to commence business are to be read as if they contained a provision that they shall not be binding on the company unless and until it becomes entitled to commence business. It makes no difference whether a contract is preliminary or final or one in the course of carrying on the company's business; and if a company never becomes entitled to commence business no contract entered into by it is binding on it, and no one can sue it in respect of any such contract. *In re Otto Electrical Manufacturing Co. (1905), Jenkins' Claim*

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DEBENTURES — Debenture-holders' Action — Solicitor — Costs — Solvent Company — Recovery and Preservation of Assets outside Action — Difference between Party and Party and Solicitor and Client Costs — Charging Order — Solicitors Act, 1860, s. 28.

The Court will give the solicitor to the plaintiff in a debenture-holders' action a charging order, under section 28 of the Solicitors Act, 1860, on the property recovered in the action for the debenture-holders, for his costs in the action as between solicitor and client, even when the property so recovered proves sufficient for the payment of the debenture-holders in full, provided that there is reason to believe that he will not be able to recover from his own client the difference between solicitor and client and party and party costs.

Dictum of KAY, J., in Harrison v. Cornwall Minerals Railway followed. In re W. C. Horne and Sons, Limited, Horne v. W. C. Horne and Sons, Limited

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— Debenture-holders' Action — Receiver and Manager — Advances to Receiver and Manager — Advances to Receiver by Debenture-holders — First Charge upon Property Secured by Debentures — Expenses of Management — Receiver's Remuneration — Priority.

A receiver and manager appointed in a debenture-holders' action under orders of the Court borrowed, for preserving the property of the company comprised in the debentures, certain sums, which were advanced by certain of the debenture-holders. The receiver gave in respect of the sums so borrowed formal charges, which were declared to be "first charges" on the property, and provided that the receiver should not be personally liable to repay the advances out

of his own moneys. The property charged was realised by the receiver, and proved insufficient to pay the receiver's expenses and remuneration and the sums borrowed :—

Held, that the receiver was entitled to be indemnified in respect of his expenses and remuneration out of the assets realised in priority to the lenders' claims under their charges.

Strapp v. Bull, Sons & Co. considered and followed. *In re Glasdir Copper Mines, Limited, English Electro-Metallurgical Co. v. Glasdir Copper Mines, Limited*

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DEBENTURES — Debenture-holders' Action — Receiver and Manager — Order authorising Money to be raised to a Limited Amount — General Purposes of Carrying on Business — Debts and Liabilities in Excess of Limit — Right to Indemnity.

Where a receiver and manager appointed in a debenture-holders' action is authorised by the Court to raise by mortgage of the company's assets a sum not exceeding a certain limit for the general purposes of carrying on the business, it is his duty, if he finds the limited sum insufficient, to apply to the Court to increase it or give leave to incur further expenses or liabilities. If he incurs such expenses or liabilities without applying to the Court he is not entitled to be indemnified unless he can show that, having regard to all the circumstances, he was justified in incurring them without leave.

Sembler, it is not sufficient justification merely to show that the expenses and liabilities were incurred *bonâ fide* and in the ordinary course of business. *In re British Power, Traction, and Lighting Co., Halifax Joint-Stock Banking Co. v. The Company*

74

— First Debenture-holders' Action — Third Debenture-holders not all Parties — Practice — Minutes — Immediate Sale.

In a motion for judgment in a first debenture-holders' action on admissions in the pleadings, one of the proposed minutes asked for an immediate sale by the receiver, under Ord. 51, r. 1B, of the property comprised in the security, which was proved to be in jeopardy of loss. There was also in existence another series of debentures, only some of the holders of which were now before the Court :—

Held, that the proposed minute must be varied so as to direct that a sale should take place with the approbation of the Court, as this would enable those second debenture-holders who were not now represented to come in when the contract should come before the Court for its approval. *In re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*

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— Loan — Blank Debentures Deposited as Security — "Issue" — Equitable Security — Loan Repaid and Debentures returned to the Company — Reissue of Debentures.

A company issued debentures as a second charge on the property of the company. Twenty-one debentures were sealed in blank—that

is to say, without the insertion of any name as the creditor of the company, or of any date—and were deposited with a bank as security for a loan. The loan was afterwards paid off by the company, whereupon the bank returned the debentures to the company.

Subsequently the company filled in six of these debentures with the date and with the name of a syndicate, and issued them to the syndicate for value. The company claimed to be entitled to issue the remaining fifteen in a similar manner. The company had no power to reissue debentures which had been paid off:—

Held, that the bank, having advanced money on the security of the debentures, was entitled to be placed in the position of a secured creditor, and there being in effect a contract by the company to issue the debentures to the bank by way of security, that in the view of equity amounted to an issue of them.

The decision in *In re W. Tasker and Sons, Limited*, *Hoare v. W. Tasker and Sons, Limited*, was therefore applicable to the case, and none of the twenty-one debentures could be validly reissued, but must be cancelled. *In re Perth Electric Tramways, Limited*, *Lyons v. Tramways Syndicate*.

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DEBENTURES — Money Borrowed for Purposes of Construction — Incidence of Interest—Profits.

There is no general rule of law compelling a company to charge interest on money borrowed for purposes of construction against revenue and prohibiting it from charging it, during construction, to capital account.

A company borrowed money, by the issue of 5 per cent. conversion debenture stock, for the purpose of converting its tramway system to electric traction, at the estimated cost of 10,000*l.* per mile:—

Held, that it was entitled to charge against capital not only the 10,000*l.*, but also 500*l.* interest, in respect of each mile until completion and opening to traffic. *Hinds v. Buenos Ayres Grand National Tramways Co.*

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— Registration—Extending Time—Proviso for Protection of Prior Rights — Winding-up—Rights of Unsecured Creditors—Companies Act, 1900, ss. 14, 15.

Where the time for registration of debentures has been extended by an order under section 15 of the Companies Act, 1900, containing the usual proviso for the protection of rights acquired prior to the date of actual registration, the holders of such debentures are in a winding-up of the company entitled to priority over ordinary unsecured creditors whose debts were in existence at the date of the registration.

The proviso is merely intended to protect rights acquired against or affecting the property of the company which intervene between the expiration of the twenty-one days within which the debentures are required to be registered under section 14 of the Act and the extended time allowed by the order, and does not protect the existing

unsecured creditors who have not obtained any security or charge upon the property subject to the debentures.

In re Anglo-Oriental Carpet Manufacturing Co. approved, but distinguished.

In re Johnson & Co. discussed and explained. *In re Ehrmann Brothers, Limited, Albert v. Ehrmann Brothers, Limited* . . . 256, 368

DEBENTURES—Registration—Application to extend Time—Form of Order — Terms — “Just and expedient” — Protection of Unsecured Creditors—Companies Act, 1900, ss. 14, 15.

Debentures of a company, issued in 1905, were not registered within the time limited by section 14 of the Companies Act, 1900. The omission to register them was due to inadvertence, and the financial position of the company was sound. On an application under section 15 of the Act of 1900 for an order extending the time for registration :—

Held, that in the circumstances of the case an order might be made on the terms imposed in *In re Johnson & Co.*, without inserting any words for the protection of unsecured creditors, although it had been decided in *In re Ehrmann Brothers, Limited*, that that form of order does not protect unsecured creditors; but that in a case of sufficient magnitude it might be well to give notice to unsecured creditors of substantial amount so as to give them an opportunity of being heard on the question of what is “just and expedient” in their interest. *In re Cardiff Workmen’s Cottage Co.* 382

DIRECTORS—Liquidation of Bank—Alleged Negligence of President—Liability for Conduct of Officers.

In the liquidation of a company a director cannot be made personally liable on the ground that he has trusted the regularly authorised officers of the company and has failed to detect, and been misled by misrepresentation or concealment by such officers when there was no reason for doubting their fidelity.

The respondent was president of a bank which became insolvent, and was specially remunerated for his services. The shareholders at the annual general meeting appointed three of their number to constitute a board of audit to look into the operations of the bank, to examine its books and papers, and to report thereon, but these had failed to discover the irregularities which caused the failure of the bank :—

Held, that the respondent was not personally liable for the loss sustained by the bank.

Dovey v. Cory followed. *Préfontaine v. Grenier* 401

— Election—Powers—Postponement of General Meeting.

In the absence of express power in the articles of association, directors have no power to postpone a general meeting of shareholders which has been properly convened. The fact that the

directors have power to fix the time and place of the meeting and to adjourn the meeting does not give them the power.

A director may be appointed in an informal manner, provided the requirements of the articles of association are complied with. A director need not therefore be appointed at the offices of the company. *Smith v. Paringa Mines, Limited; Paringa Mines, Limited v. Blair; Paringa Mines, Limited v. Boyle*

316

DIRECTORS — Management — Articles of Association — Resolution of Shareholders at General Meeting—Refusal of Directors to Carry Out—Sale of Assets of Company.

On a requisition of certain shareholders in the plaintiff company, a meeting of the company was convened by the directors in January, 1906, and a resolution was then passed by a simple majority for the sale of the business to a new company, and the directors were directed to cause the seal of the company to be affixed to a contract to effect the sale which had been prepared and was before the meeting. The directors were of opinion that it was not in the interest of the company that the contract should be carried out, and they declined to comply with the resolution. An action was brought by the company, and a shareholder on behalf of himself and all other shareholders, asking that the directors might be ordered to affix the seal of the company to the contract, and for other incidental relief.

Among the objects of the company stated in the memorandum of association was "to sell the undertaking of the company, or any part thereof." By the articles of association the management of the business of the company was vested in the directors, and they had power to do all such things as might be done, and were not by the articles or by statute expressly required to be done, by the company in general meeting, but subject to any regulations which might be made from time to time by the company by extraordinary resolution; and they had power to sell or deal with any property of the company on such terms as they might think fit. A director could only be removed from office by a special resolution of the company:—

Held, that the directors were in the position of managing partners, and their mandate was the mandate of the whole body of shareholders, not of the majority only. If that mandate had to be altered, it could only be done by the machinery provided by the articles, and it was not competent for a simple majority of the shareholders by a resolution at an ordinary general meeting to alter the mandate and override the discretion of the directors. *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*

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— Share Qualification—"Hold in his own Right"—Holding as Liquidator—Income Tax on Directors' Fees—De facto Directors—Irrregularity—Ratification—Powers of General Meeting—Notice.

A person who is entered on a company's register as holding shares as liquidator of another company does not hold the shares "in his own right" so as to acquire a qualification as director under an

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article requiring a director to hold his share qualification "in his own right."	
Where not authorised by the articles of association, the payment by the directors of the income tax on their fees out of the company's funds is an illegal payment.	
Where a general meeting is called by the only acting directors of a company, acting as a board and pursuant to a resolution of the board, and notice thereof is duly sent to the shareholders of the company, and one of the objects of the meeting is to confirm past proceedings, the fact that one or more of the directors have been irregularly appointed will not invalidate a resolution passed at the meeting.	
<i>Browne v. La Trinidad and British Asbestos Co. v. Boyd</i> followed. <i>In re State of Wyoming Syndicate</i> distinguished.	
Where the amount of directors' remuneration is fixed by the articles of association, and the directors have voted themselves a sum in excess of that amount, a general meeting cannot ratify the irregularity without first altering the articles.	
Where a notice convening a general meeting states that the shareholders will be asked to ratify the election of a director and to receive the directors' report and accounts, this is a sufficient notice to bring the question of ratification within the competency of the meeting.	
<i>Irvine v. Union Bank of Australia</i> followed. <i>Boschoek Proprietary Co. v. Fuke</i>	100
DIRECTORS' LIABILITY ACT, 1890 (53 & 54 Vict. c. 64)	172
s. 3	279
s. 5	279
FORMATION— <i>Incorporation and Registration Abroad—Income Tax—</i> —"Person residing in the United Kingdom"—"Trade exercised within the United Kingdom"—Head Office Abroad—General Meetings Abroad—Office in England—Directors' Meetings in England and Abroad—Control and Management in England—Income Tax Act, 1853, s. 2, Schedule D.	
A foreign company may be a "person residing in the United Kingdom" within the meaning of section 2, Schedule D, Income Tax Act, 1853, notwithstanding that its head office is situated abroad and its general meetings are held abroad. A company incorporated and registered abroad, which has an office in London and directors living in the United Kingdom, is resident here within the meaning of the Income Tax Act, 1853, s. 2, Schedule D, and liable to income tax in this country.	
Decision of the Court of Appeal affirmed. <i>De Beers Consolidated Mines, Limited v. Howe (Surveyor of Taxes)</i>	394
— Work done before Formation—Adoption of Work by Company—Fees on Registration—Liability of Company—Companies Act, 1862, s. 17.	
A company is under no liability in equity to pay for work done before its formation merely because it has adopted and derived benefit from such work.	
Where, therefore, solicitors have done work in connection with the	

formation of a company which is subsequently incorporated, they must, in order to recover their costs of such work from the company, establish a legal claim against the company either on their own behalf or on behalf of some person in whose shoes they are entitled to stand.

Per BUCKLEY, J.: They can, however, recover the fees paid by them on the registration of the company, inasmuch as the company is under a statutory liability to pay the same.

In re Hereford and South Wales Waggon and Engineering Co. explained and dictum discussed. *In re English and Colonial Produce Co., Limited*

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GAS COMPANY—Dividend—Maximum Rate fixed by Statute—Payment of Dividend Free of Income Tax—Income Tax Act, 1842, ss. 54, 60, Sched. (A.) No. III., 3—Income Tax Act, 1853, s. 40—Ashton Gas Act, 1877, ss. 16, 18, 19.

Where a gas company is prohibited by its special Act from paying a dividend in excess of a specified rate, it cannot pay dividends at the maximum rate free of income tax. In calculating the maximum dividend payable, income tax on the dividend must be included.

Decision of the Court of Appeal affirmed. *Ashton Gas Co. v. Attorney-General*

35

INSURANCE (LIFE)—Deed of Settlement—Bye-laws—Power to alter bye-laws—Prospectus—Participating Policy-holder.

Where a policy of life assurance is expressed to be issued subject to the deed of settlement of the company and its bye-laws, and by the constitution of the company, power is given in a prescribed manner to alter the bye-laws from time to time, and no reference is made in the policy to prospectuses issued by the company, the policy constitutes the whole contract, and the Court cannot for the purpose of construing the contract refer to such prospectuses.

Decision of the Court of Appeal reversed. *British Equitable Assurance Co. v. Baily*

13

MEETING OF SHAREHOLDERS—Voting—“Personally or by proxy”—Poll—Voting Papers—Power of Chairman.

The articles of association of a limited company provided that votes might be given either personally or by proxy, and that if a poll were demanded it should be taken in such a manner as the chairman of the meeting should direct. A poll being demanded, the chairman directed the poll to be taken by means of voting papers:—

Held, that taking the poll by voting papers was unauthorised and invalid. *McMillan v. Le Itoi Mining Co.*

65

PROSPECTUS—Misleading Statements—Omissions—Director—Liability—“Sub-purchaser”—Companies Act, 1900, s. 10, sub-s. 1 (f)—Directors Liability Act, 1890.

Where a company is the purchaser of property which at law as well as in equity belongs absolutely to the vendor, section 10,

sub-section 1 (*f*), of the Companies Act, 1900, which prescribes the publication in the prospectus of the name and address of the vendor and the amount of the consideration, does not require that the prospectus shall disclose the amount of the purchase-money paid by the vendor upon his acquisition of the property. Generally speaking, a company is not a "sub-purchaser" for the purposes of this sub-section unless it has to pay purchase-money to some one other than its own vendor; nor need the prospectus contain a statement of the amount of any consideration paid or to be paid by any one other than the company itself. The whole of the consideration, cash, shares, or debentures, payable to any one by the company in respect of the purchase or acquisition of the property, must be stated.

Brookes v. Hansen 172

PROSPECTUS — Non-disclosure of Contract — Directors' Liability — Damages—Waiver Clause—Companies Act, 1867, s. 38.

In an action based on section 38 of the Companies Act, 1867, against a director, promoter or officer of a company for non-disclosure of a contract in a prospectus the plaintiff must prove that if he had known of the contract he would not have taken shares; that he has suffered damage from such non-disclosure; and that the defendant knew of the existence of the undisclosed contract.

The defendant may also be protected by a waiver clause which is honest and above suspicion.

Decision of the Court of Appeal reversed. *Calthorpe v. Trechmann; Macleay v. Tait* 24

— Untrue Statement — Compensation — Contribution — Directors Liability Act, 1890, ss. 3, 5.

Directors of a company issued a prospectus which contained an untrue statement that the only contracts to which the company was a party were two, omitting a third which was material to be disclosed. An action against some of the directors was brought, and judgment obtained, by a shareholder who had taken shares on the faith of the prospectus, for compensation for loss or damage sustained by reason of the untrue statement under section 3 of the Directors Liability Act, 1890. After appeal to the House of Lords, where the judgment of the Court of Appeal, affirming the judgment of the Court below, was affirmed, a compromise was arrived at between the parties to the action under which the shareholder was to receive an agreed sum of 300*l.* by way of compensation or damages, the taxed costs of an inquiry which had been begun, but was agreed not to be further proceeded with, and 700*l.* for additional costs. The amounts were paid, together with the taxed costs of the action and appeals, by the present plaintiffs, who were some of the directors, and who contributed to the payment in equal shares. A number of other similar actions were commenced or claims made against the present plaintiffs, of which some were compromised; in others judgment was entered by consent for an inquiry as to damages; in others money was paid into Court to answer the claims. In respect of these, the

present plaintiffs had paid or become liable to pay large sums, and incurred considerable costs and expenses. They commenced this action under section 5 of the Directors Liability Act against their co-directors and the representatives of deceased co-directors for contribution to the payments they had made or become liable for, and to the costs and expenses they had incurred, and to their own solicitor and client costs and reasonable expenses:—

Held, that they were entitled to contribution to (1) sums paid for compensation for loss or damage, (2) taxed costs of the plaintiff in the original action up to and including judgment, and (3) costs paid to other claimants (whether under judgment in actions or agreement), but not (4) the additional costs of the plaintiff in the original action, nor (5) the present plaintiffs' own costs in that action, nor (6) costs in the Court of Appeal and the House of Lords. *Shepheard v. Bray*

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RECONSTRUCTION—Memorandum of Association—Sale to New Company—Shares of Dissentient Shareholders—Return of Rateable Proportion of Proceeds of Sale—Forfeiture—Ultra vires—Injunction—Companies Act, 1862, s. 161.

A company which had power under its memorandum of association to sell its undertaking for shares of any other company having objects altogether or in part similar, before going into liquidation, passed a resolution approving a draft agreement for a sale of its undertaking to a new company for the same number of shares as those issued in the old company, but subject to a liability per share. A clause of the agreement provided that within a fixed time after the winding-up the liquidator should require members to claim for allotment in the new company within a specified time, and as regards such shares as were not claimed accordingly should "use his best endeavours to sell the same for what they would fetch," the proceeds of sale, after paying expenses, to be "distributed rateably among the members who, if they had claimed, would have been entitled to such shares in accordance with their rights and interests":—

Held, that the proposed scheme was not justified by the memorandum of association, and was *ultra vires*, as it constituted such a forfeiture of the shares of dissentient members in a going concern as was not contemplated in their contract with the company, and none the less because there was a provision for a rateable distribution of the proceeds of sale by the liquidator.

Manners v. St. David's Gold and Copper Mines, Limited, followed.
Bisgood Nile Valley Co.

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— Winding-up—Memorandum—Sale of Assets for Partly Paid Shares—Distribution among Shareholders—Option to Accept Shares—Shares not Accepted to be Sold and Proceeds Distributed—Equality—Ulta vires.

A company was incorporated with a capital of 140,000*l.* in 117 shares, which were issued and fully paid. The memorandum of association provided that the objects of the company were, *inter alia*, "to sell . . . the undertaking . . . of the company . . . for such consideration as the company may think fit, and in particular for

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any shares, fully or partly paid up, . . . of any other company, and to divide such part or parts, as may be determined by the company, of the purchase-money, whether in cash, shares, or other equivalent, . . . amongst the members of the company, by way of dividend or bonus in proportion to their shares, . . . and the powers contained in this . . . sub-section shall be exercisable whether in view of a winding-up of the company or not"; and "to distribute any of the assets of the company amongst the members in specie, or otherwise. . ." The company agreed to sell their undertaking to another company in consideration—first, of payment of debts and liabilities; secondly, of payment of costs of winding-up if resolved upon within six months; and thirdly, of 140,000 shares of 5s. each of the purchasing company credited with 3s. 6d. paid up, the vendor company or its nominees within a limited time to apply for and accept an allotment of the shares, and, in default, the shares unapplied for to be at the disposal of the purchasing company. Subsequently resolutions were passed for voluntarily winding up the vendor company and authorising the liquidator to offer the shares of the new company receivable under the agreement for distribution amongst the members of the old company at the rate of one new share for each old share, and in the event of any members not accepting their due proportion of shares within a limited time the liquidator was to use his best endeavours to sell the shares not accepted upon the best terms obtainable, and to hold the proceeds upon trust for distribution among the non-accepting members:—

Held, that the agreement and proposed distribution of shares were not *ultra vires*.

Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Limited, followed.

Manners v. St. David's Gold and Copper Mines, Limited, and *Bisgood v. Nile Valley Co.* distinguished. *Fuller v. White Feather Reward, Limited*.

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SHARES—Equitable Title—Priority—Notice—Distringas—Negligence—Registration—Lien of Stockbrokers—Rules of Supreme Court, Ord. 46.

The owner of shares assigned all his property to the plaintiffs for the benefit of his creditors. The plaintiffs demanded the certificates, but were told that they were abroad. They then gave notice of the assignment to the company, but did not proceed under Ord. 46. The owner subsequently instructed the defendants, his stockbrokers, to sell the shares, which they did, paying the proceeds to the owner and receiving from him the certificates, which they lodged with the company for certification. The company, having notice of the assignment, refused to register the transfers to the purchasers. The stockbrokers thereupon purchased and delivered to the purchasers other shares in substitution for those originally sold. These latter shares the stockbrokers now claimed to have registered in their names:—

Held, that the plaintiffs had not disentitled themselves by negligence, and that their prior equitable title must prevail. *Peat v. Clayton*.

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SHARES — Mortgage — Agent — Blank Transfer — Estoppel — Notice to Company not to Register — Right to Sue — Damages for Delay Occasioned — Measure of.

A person who executes a transfer of shares thereby comes under an implied obligation not to hinder the transferee from obtaining registration, and this applies to a case where the transfer is originally made in blank by the transferor and subsequently filled in by a *bond fide* holder for value, in whose favour it is binding by estoppel against the transferor.

Dictum of Lord ESHER, M.R., in London Founders' Association v. Clarke, followed and applied.

The measure of damages for the breach of such obligation is the difference between the value of the shares at the time when in the ordinary course they would but for the delay caused by the transferor have been registered in the name of the transferee and their value at the time when the transferee's right to registration is established, in estimating which all the material circumstances affecting the selling value of the shares must be taken into account.

W. executed a blank transfer of shares, and placed it, together with the share certificate, in the hands of H. for the purpose of raising money under circumstances which the Court held to estop W. from denying that he had given to H. the necessary authority. H. applied to the plaintiff, who made a small advance out of his own money (which was afterwards repaid), and also at H.'s request borrowed 700*l.*, for H.'s use, from a bank, on the deposit of the blank transfer and share certificate and on the plaintiff's personal security, H. undertaking to indemnify the plaintiff and to repay to him the 700*l.* The loan not having been repaid, the bank, with a view to realise the security, filled up the blank transfer with the plaintiff's name as transferee, and sent it to the company for registration. W. thereupon gave notice that he disputed the validity of the transfer, thus preventing the plaintiff from dealing with the shares, which had since fallen in value. The plaintiff brought this action, claiming damages against W. Since the commencement of the action the plaintiff had repaid the 700*l.* to the bank:—

Held, that W., in preventing the registration of the plaintiff's name as transferee, had committed a breach of his implied obligation arising out of the transfer, and that the plaintiff was in a position to claim damages for that breach. *Hooper v. Herts.*

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— *Share Certificate — Forgery by Secretary — Warranty of Title — Estoppel.*

A company is not liable in damages for loss sustained by the purchaser for value of a certificate on which the names of the directors, whose signature under the articles of association is necessary to the validity of the certificate, have been forged by the secretary. The fact that the certificate is in proper form and delivered by the secretary in the ordinary course of his duty does not operate in such a case as a warranty or representation of

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genuineness or estop the company from denying the validity of the certificate.	
Decision of the Court of Appeal affirmed.	
<i>Shaw v. Port Philip Gold Mining Co.</i> doubted. <i>Ruben v. Great Fingall Consolidated, Limited</i>	248
WINDING-UP — Assets covered by Debentures — Unsecured Creditor— Possibility of Benefit—Right to Winding-up Order—Companies Act, 1862, s. 79.	
An unpaid creditor of a company who shows the company to be insolvent is entitled <i>ex debito justitiae</i> to a winding-up order, subject to the right of the majority of creditors of the class to which he belongs to oppose the petition.	
It is no defence to the petition on the part of the company that there are no assets to wind up; and if the order will be useful, though not necessarily fruitful, there is jurisdiction to make it.	
Per COLLINS, M.R.: The onus of proving that in no possible case could the petitioner gain any benefit from a winding-up order is upon the company and the debenture-holders claiming through it. <i>In re Crigglestone Coal Co.</i>	233
— Assets Exhausted by Debentures—Debenture-holders carrying on Business—Unsecured Creditor—Right to Winding-up Order—“Just and Equitable”—Companies Act, 1862, s. 79.	
The Court is not bound to exercise its discretion by refusing, at the instance of the company, to make a winding-up order merely on the ground that the order will produce nothing for the unsecured creditors.	
A company had a paid-up capital of 2,507 <i>l.</i> , and a debenture debt of over 6,000 <i>l.</i> The debentures were held by three individuals. It was doubtful whether there would be assets for the payment of anything to unsecured creditors on a winding-up. A judgment creditor presented a petition for the compulsory winding-up of the company, which was opposed by the company, and neither supported nor opposed by other unsecured creditors:	
<i>Held</i> , that, since the debenture-holders were in substance carrying on the business, using the company's name, the company ought, under the “just and equitable” clause of section 79 of the Companies Act, 1862, to be wound up, even if the order would produce nothing for the unsecured creditors. <i>In re Alfred Melson & Co.</i>	190
— Dissolution of Company — Sale of Assets — Leaseholds — No Assignment — “No Existing Trustee” — Appointment of New Trustee — Vesting Order — Companies Act, 1862, s. 143 — Trustee Act, 1893, ss. 25, 26.	
A company registered under the Companies Act, 1862, went into voluntary liquidation early in 1896, with a view to reconstruction, and the liquidators entered into an agreement for the sale of the property of the company, which included certain leasehold premises, to a new company. Shortly afterwards the new company was let into	

possession of the leasehold premises and had ever since been in possession thereof, but no formal assignment of the same was executed, and in October, 1896, the old company became dissolved by virtue of section 143 of the Act of 1862. The new company presented a petition for a declaration that the old company was at and immediately before its dissolution possessed of the leasehold premises as trustee for the petitioner within the meaning of the Trustee Act, 1893, and for the appointment, pursuant to section 25 of the same Act, of a named person as trustee of the premises in place of the old company, and for a vesting order pursuant to section 26 of the same Act. The Court made the appointment of the new trustee and the vesting order asked for by the petition.

Hanover (King) v. Bank of England, In re Trusts of Land at Farnborough, and In re General Accident Assurance Corporation, Limited, applied.

In re Taylor's Agreement Trusts distinguished.

The words of section 25 of the Trustee Act, 1893, "although there is no existing trustee," do not limit the powers given to the Court by that section or make it incumbent upon persons who apply to the Court to exercise its powers to show that there is no existing trustee. *In re 9, Bomore Road*.

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WINDING-UP—*Fraudulent Preference—Unregistered Agreement to Give Security when Called upon—Security Given on Eve of Winding-up—Companies Act, 1862, s. 164—Companies Act, 1900, s. 14.*

W. J. was "permanent director" and the largest shareholder in a company registered in March, 1904. His son was one of the other two directors. The company had a large turnover in 1904 and 1905. In December, 1904, it applied to its bankers for an overdraft, which the bankers agreed to give on the terms that W. J. should guarantee it. He guaranteed an overdraft up to 2,500*l.*, on an agreement by the company to give him security by means of a debenture or other charge whenever he should call upon the company to do so. In February, 1905, he guaranteed an overdraft up to 4,000*l.* on a similar agreement. He was a large trade creditor of the company. In 1905 the company made a heavy trading loss. On 8 December, 1905, W. J. asked the company for the security, and on 15 December the company gave him a debenture for the then amount of the overdraft, charged on all its property. The debenture was duly registered under section 14 of the Companies Act, 1900, but neither of the agreements was registered. On 1 January, 1906, the company went into voluntary liquidation. On a summons taken out by the liquidator in the winding-up for a declaration that the debenture was invalid as a fraudulent preference within section 164 of the Companies Act, 1862:—

Held, that, in view of the constitution of the board of directors, W. J. could have had the debenture at any time; that the agreement to give it, although made for value, could not be allowed to have legal effect if its performance were postponed until the time within which the law as to fraudulent preference takes effect had

	PAGE
arrived, and that the debenture was therefore a fraudulent preference, and invalid.	
<i>In re Ash, Ex parte Fisher, and In re Barker, Ex parte Kilner, applied. In re Jackson and Bassford, Limited</i>	306
WINDING-UP—Petition — Affidavit verifying Petition — Affidavit by Agent of Petitioner — Sufficiency — Companies (Winding-up) Rules, 1903, r. 29.	
Notwithstanding that Rule 29 of the Companies (Winding-up) Rules, 1903, requires a petition for the winding-up of a company to be verified by an affidavit "made by the petitioner," the Court will in a proper case accept as sufficient an affidavit other than that of the petitioner.	
Thus, where the petitioner was resident in South Africa, the Court accepted the affidavit of his attorney and agent, who knew the facts on which the petition was based, whereas the petitioner did not.	
<i>In re Charterland Stores and Trading Co. not followed. In re African Farms, Limited</i>	123
— Voluntary Winding-up—Action by Creditor—Stay of Action—Discretion of Court—Onus of Proof—Companies Act, 1862, ss. 85, 87, 138—Companies Act, 1900, s. 25—Companies (Winding-up) Rules, 1903, rr. 1, 92, 94, 107.	
In an action by a creditor against a company in voluntary liquidation the plaintiff claimed a sum certain as an agreed fee for services rendered, and in the alternative claimed the like sum as on a <i>quantum meruit</i> . Upon an application for judgment under Ord. 14, the liquidator of the company disputed the plaintiff's claim. The liquidator obtained unconditional leave to defend, and an order was made giving directions as to pleadings, discovery, and trial of the action. The liquidator subsequently applied that all further proceedings in the action should be stayed upon the ground that the company was being wound up voluntarily :—	
<i>Held</i> (affirming the order of PHILLIMORE, J., at Chambers), that the application must be refused.	
Per COLLINS, M.R.: Where, in an action by a creditor against a company in voluntary liquidation, the creditor's claim is disputed by the liquidator, the presumption is in favour of the action being allowed to proceed. <i>Currie v. Consolidated Kent Collieries Corporation, Limited</i>	60

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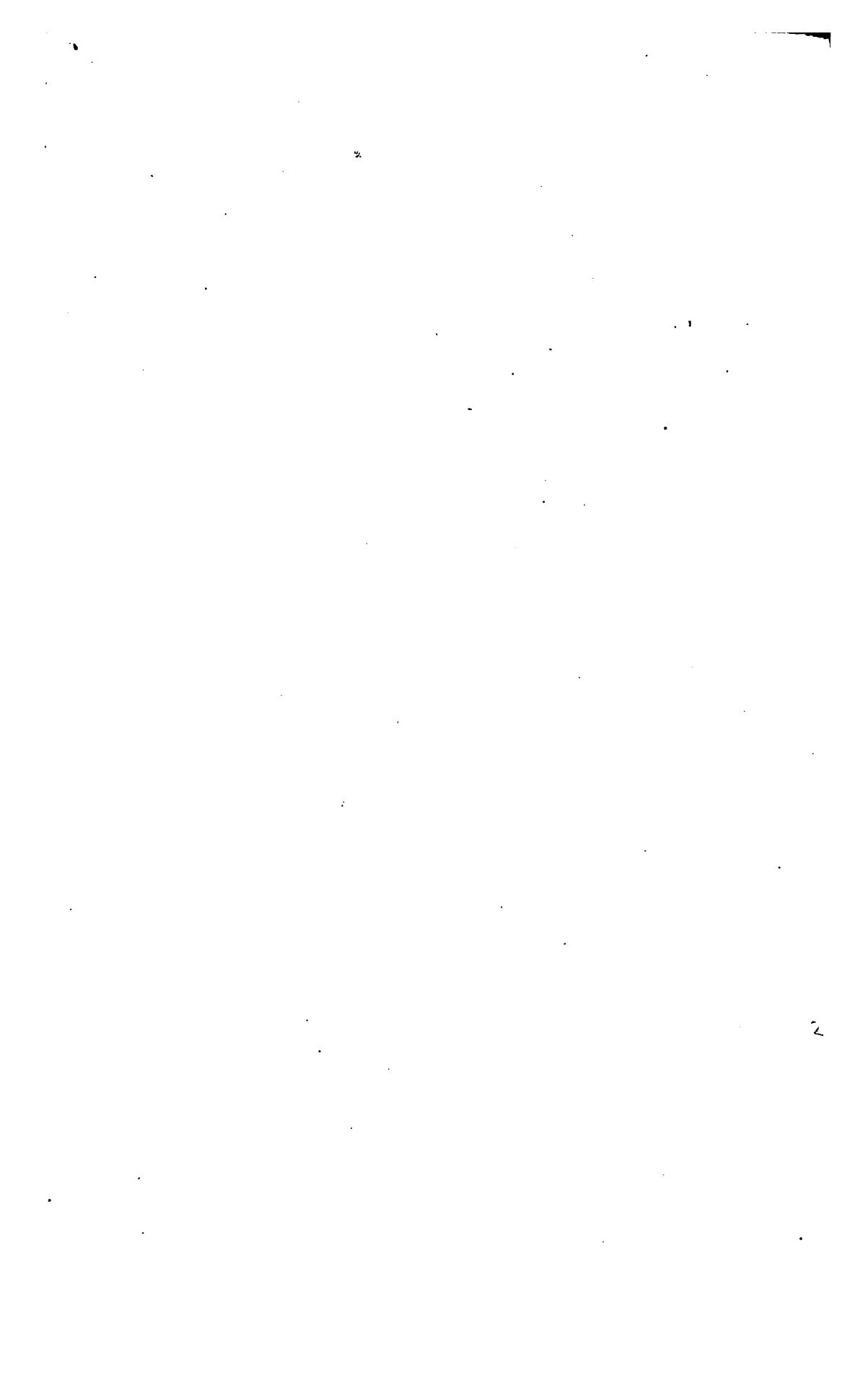
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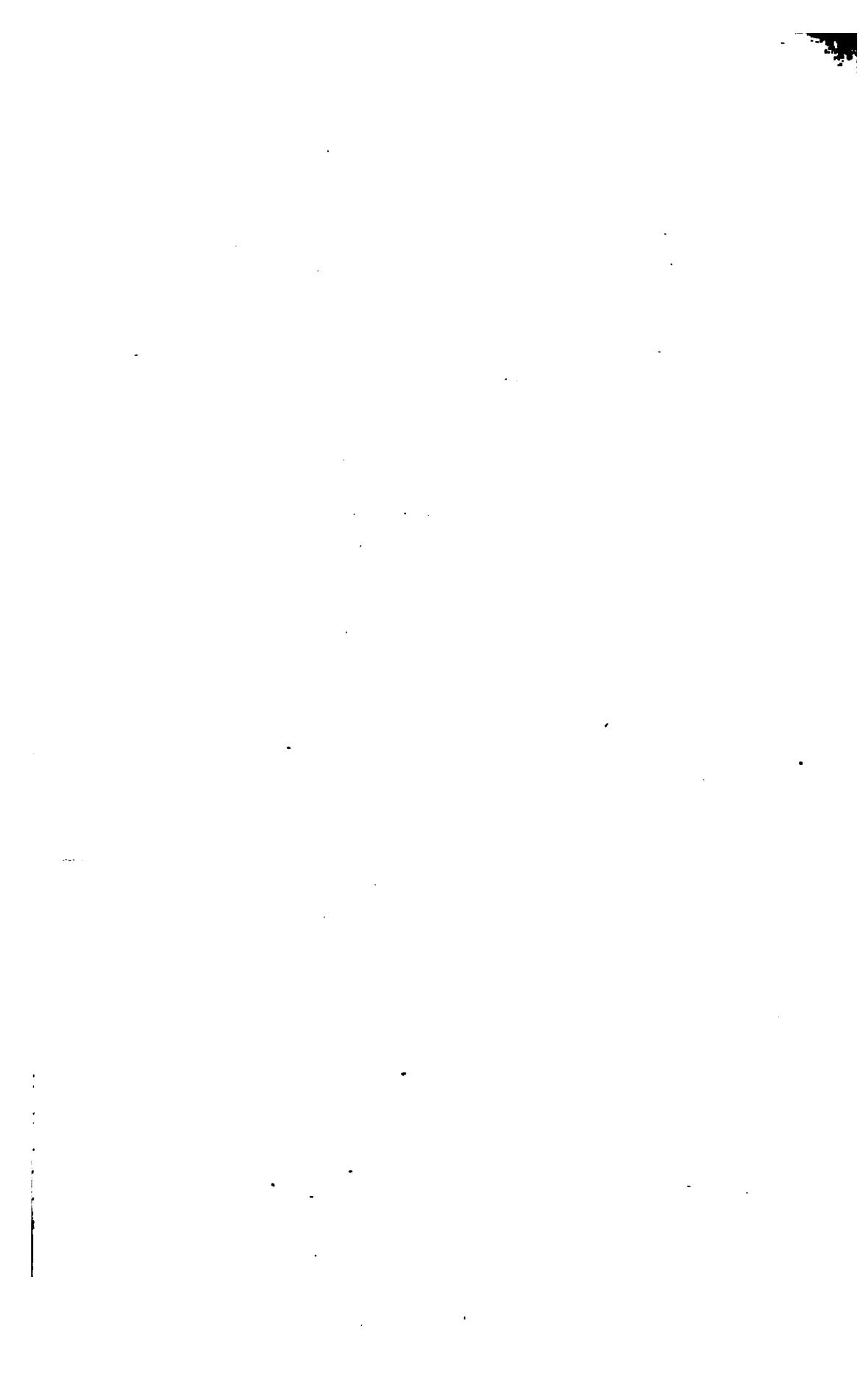
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